78-1014

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM A. KUBRICK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS

Cases:

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-14a) is reported at 581 F.2d 1092. The opinion of the district court (App. B, *infra*, 15a-70a) is reported at 435 F.Supp 166.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 71a) was entered on July 27, 1978. On October

16, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 24, 1978, and on November 14, 1978, he further extended the time to and including December 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a claim for medical malpractice under the Federal Tort Claims Act "accrues" when the claimant knows both the existence and cause of the injury, even if he does not know that the infliction of the injury amounted to negligent medical practice.

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

2. 28 U.S.C. 2675(a) provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government

> while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim.

STATEMENT

Respondent was admitted to a Veterans Administration hospital in April 1968 for treatment of an infection of his right femur. The infected area was irrigated after surgery with a solution of the antibiotic neomycin sulfate. Approximately three months later respondent noticed a ringing in his ears and loss of hearing. In August 1968 he consulted a private ear specialist, who diagnosed the condition as bilateral nerve deafness (App. A, *infra*, 2a). Later in the year respondent consulted another specialist, who obtained his VA treatment records; in January 1969 that physician advised respondent that the VA's administration of neomycin was either the cause of his deafness or "probably" the cause (App. A, *infra*, 2a).

Respondent had been receiving VA disability benefits for a service-connected injury. In April 1969 he

applied for an increase in benefits, under 38 U.S.C. 351, alleging that the administration of neomycin by the VA surgeon had caused his hearing loss (App. A, *infra*, 3a). The VA denied the application in August 1969, stating that it found no causal connection between the neomycin treatment and respondent's hearing loss and that there was no " 'carelessness, accident, negligence, lack of proper skill, error in judgment, or any other fault on the part of the government' " (App. B, *infra*, 25a). In September 1969, although orally advised by a VA Adjudication Officer that his hearing loss was not attributable to his April 1968 hospitalization, respondent filed another statement in support of his disability claim, this one disputing the VA's denial of causation (*id.* at 25a-26a). The claim was denied on the grounds previously given (*id.* at 26a). Respondent and his wife then wrote letters to various VA officials and to United States Senators, protesting the denial of his claim and disputing the VA's finding that there was no causal connection between the use of neomycin and his deafness (App. B, *infra*, 28a).

In May 1971 respondent obtained a VA field report on his case. This report contained a statement attributed to Dr. J. J. Soma, the first private ear specialist respondent had consulted, suggesting that his deafness was related to his previous occupation as a machinist. In June 1971 respondent personally questioned Dr. Soma, who denied making the statement and told respondent that the neomycin had caused his deafness and should not have been administered. Several weeks later respondent consulted an attorney (App. B, *infra*, 26a-28a).

Respondent filed this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), in September 1972, asserting that he had been injured by the negligence of the VA surgeon (App. A, *infra*, 5a). The United States denied the allegations and defended on the ground that the claim was barred because it was not filed with the agency within the Act's two-year limitations period, 28 U.S.C. 2401(b).[1]

The district court held that the neomycin treatment caused respondent to become irreversibly deaf and constituted medical malpractice (App. B, *infra*, 16a-21a). The court also held that respondent's claim did not accrue until June 1971, when Dr. Soma told respondent that the use of neomycin had been improper (*id.* at 20a, 61a). The court therefore found that the claim was not time-barred, because respondent filed his claim with the VA in January 13, 1973. The court entered judgment for respondent in the amount of $320,536. The government appealed, raising principally the argument that the suit was time-barred.

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[1] Respondent did not file a claim with the agency, as required by 28 U.S.C. 2401(b) and 2675(a), until January 13, 1973, after the suit had been filed. The district court held that the government's objection to the premature filing of the suit became moot when the VA denied the claim before trial, on April 13, 1973 (App. E, *infra*, 73a-74a). Because the claim was timely filed with the VA under the district court's view of its accrual date, the court concluded that respondent could have refiled his suit had it been dismissed as premature, and that there was therefore no reason to dismiss and require refiling.

2. The court of appeals affirmed.[2] The court began with the proposition that "the two-year limitations period does not begin to run until the claimant has discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice upon which his claim is based" (App. A, *infra*, 7a). "In most cases," it stated, "knowledge of the causal connection between particular matters of treatment and injury, without more, will * * * alert a reasonable person that there has been an actionable wrong," but it concluded that in a "few instances where a patient, although aware of the nexus between treatment and injury, has no reason to believe that negligence was present, a different rule applies" (*id.* at 10a). This rule must be applied on an "ad hoc basis," using "subjective, as well as objective standards," the court explained (*id.* at 10a-11a).

In the present case, the court found the "different rule" applicable because of the "technical complexity" of the question whether the "neomycin treatment involved excessive risk, the failure of any of respondent's doctors to suggest before June, 1971 the possibility of negligence, and the government's repeated denials of causation" (App. A, *infra*, 11a). Summarizing the rationale of its holding, the court stated (*id.* at 12a):

> [Respondent] knew or should have known that neomycin was the direct cause of his hearing loss. He did not, however, know that the administration of the drug was medical negligence. Thus, he knew two of the essential elements of a possible cause of action—causation and damages—but he did not know, nor could he reasonably have been expected to know, according to the district court's findings, of the breach of duty on the part of the government. In these circumstances, the limitation period did not run until Dr. Soma's conversation suggested a duty had been breached by the Veterans Administration.

[2] It remanded in one respect. In 1975 the VA increased respondent's disability benefits to compensate for the hearing loss caused by the administration of neomycin. The court of appeals held that the district court had improperly declined to setoff amounts by which the benefit payments made to respondent had been increased. The case was remanded for a reduction of the judgment (App. A, *infra*, 13a-14a).

REASONS FOR GRANTING THE PETITION

1. The Federal Tort Claims Act provides that an action is barred unless commenced by filing an administrative request within two years after the "claim accrues" (28 U.S.C. 2401(b)). The statute does not specify when a "claim accrues." The usual rule under federal law is that the claim "accrues" on the date of the act or acts giving rise to the right to recover.[3] See *Urie* v. *Thompson*, 337 U.S. 163 (1949).

Federal courts have applied a different rule, however, in cases in which the cause of an injury may be

[3] Because the date on which the two years begins to run depends on the construction of a federal statute, it raises a question of federal law. Only the First Circuit looks to state law to determine the time at which the claim accrues. See *Hau* v. *United States*, 575 F.2d 1000, 1003 (1st Cir. 1978).

difficult to determine. In malpractice cases, for example, the prevailing rule, with which we agree, is that the claim accrues when the victim "discover[s], or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice." *Quinton* v. *United States*, 304 F.2d 234, 240 (5th Cir. 1962). This means that the administrative claim must be filed within two years after the victim discovers (a) that he suffered harm, and (b) the cause of the harm.

The court of appeals in the present case has added a third element to this formula. Under its decision, the claim does not "accrue" until the victim knows that the harm was caused by negligence. The addition of this element subverts the purpose of a statute of limitations. The period of limitations prevents delay in the institution of actions and reduces the possibility that the courts will be called on to adjudicate stale claims, for which reliable evidence may be difficult to obtain.[4] The statute of limitations prevents potential plaintiffs from sleeping on their rights. Under the decision in the present case, however, a victim's inattention to his rights can become a justification for extending the period in which to sue. So long as the victim refrains from pursuing the question whether an injury with a known cause was attributable to

[4] The statute of limitations contained in 28 U.S.C. 2401(b), like other limitations on the waiver of the United States' right not to be sued, "must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

negligence, the statute of limitations does not begin to run. The decision thus significantly alters the principles governing periods of limitations by removing the incentive to prompt investigation that is a principal purpose of such statutes.

The court's alteration of the rule for the "accrual" of a cause is not necessary to treat victims fairly. Under the rule that we believe is correct, the statute begins to run only when a victim knows both the fact and the cause of the injury. The two-year period specified by 28 U.S.C. 2401(b) affords diligent persons ample time to obtain medical and legal advice concerning the propriety of the medical treatment and the legal consequences of the injury.[5] Perhaps there would be an argument for tolling the statute if there were some impediment to obtaining such advice. But the courts in the present case did not find that respondent *could* not have discovered within two years whether his treatment was negligent; it was enough, they held, that he *did* not. As we argue below, this decision aggravates a conflict among the circuits. The rule for the "accrual" of a claim potentially affects every case brought under the Federal Tort Claims Act; the recurring nature of the question makes review by this Court appropriate.

2. The decisions of the Eighth Circuit in *Reilly* v. *United States*, 513 F.2d 147 (1975), and of the

[5] Perfect knowledge of the facts and their legal consequences is not a necessary precondition to suit. Under the present system of "notice pleading" a plaintiff can allege the fact and cause of harm and then engage in discovery to find out more about the facts and whether they are actionable.

Ninth Circuit in *Brown* v. *United States*, 353 F.2d 578 (1965); *Ashley* v. *United States*, 413 F.2d 490 (1969); and *Richter* v. *United States*, 551 F.2d 1177 (1977), conflict with the decision in this case.[6]

In *Reilly* the district court had found that the claimant was aware of both injury and causation soon after her treatment at a government hospital. The Eighth Circuit ruled that "[o]nce the appellant knew of the allegedly negligent acts that caused her injury, she was under a duty to exercise reasonable diligence in bringing suit * * *. [W]hen the facts became so grave as to alert a reasonable person that there *may* have been negligence related to the treatment received, the statute of limitations began to run * * *." 513 F.2d at 149-150 (emphasis added). See also *Hulver* v. *United States*, 562 F.2d 1132, 1134 (8th Cir. 1977), cert. denied, 435 U.S. 951 (1978).[7]

[6] Several decisions adopt an approach related to the one used by the Third Circuit here. See *Jordan* v. *United States*, 503 F.2d 620, 624 (6th Cir. 1974) (at least where victim was misled about cause of harm, claim does not accrue until victim learns medical care was malpractice); *Exnicious* v. *United States*, 563 F.2d 418 (10th Cir. 1977) (claim accrues only when victim learns all elements of right of recovery—duty, breach, causation and damages); *Bridgford* v. *United States*, 550 F.2d 978 (4th Cir. 1977) (same). But see *Casias* v. *United States*, 532 F.2d 1339 (10th Cir. 1976) (distinguishing *Jordan* as based on the misleading explanation of injury given to the victim and holding a claim time-barred when victim knew cause of injury, but not existence of malpractice, for more than two years before filing claim).

[7] In *Hulver* the claimant brought suit for injuries to his left leg and impaired sexual functioning resulting from surgery to correct problems with his right leg. His claim rested primarily on allegations that he had not given informed consent to surgery on his left leg; but undisputed evidence showed that he knew, more than two years before filing his claim, that the left leg had been operated on anyway. In determining that the claim was barred, the Eighth Circuit reiterated the *Reilly* test. 562 F.2d at 1134.

The Eighth Circuit thus follows a rule that knowledge that a treatment has had serious and unexpected consequences starts the running of the statute. Under that rule, respondent's claim accrued once he knew that his severe hearing loss resulted from a drug administered to him following surgery on his leg.

The Ninth Circuit held in *Brown* and *Ashley* that Section 2401(b) barred malpractice claims where the victims knew, more than two years before filing their claims, that the injuries complained of had been caused by the acts of a government doctor. Although the claimants in both cases principally relied on the "continuous treatment" rule—the rule that the limitations period does not begin to run so long as the physician-patient relationship continues—at least two district courts in the Ninth Circuit have read those decisions as establishing a rule that the limitations period begins to run once the "*acts* constituting the alleged malpractice are known" and as rejecting the position that a claimant's "knowledge of [his] legal rights" must be shown to establish the limitations defense.[8] *Hall* v. *United States*, 314 F. Supp. 1135,

[8] A conflict between the rule applied in the Ninth Circuit and the rule applied in the present case also is suggested by *Richter* v. *United States*, *supra*, in which the Ninth Circuit affirmed a district court's dismissal of a Tort Claims Act suit. Stating that the facts of the case before it presented "a strik-

1138 (N.D. Cal. 1970) (emphasis in original). Accord, *Driskell* v. *United States*, 431 F. Supp. 339, 341-342 (C.D. Cal. 1977).

3. The court of appeals suggested that the "different rule" it applied in this case would apply in only a "few instances" in which the patient, "although aware of the nexus between treatment and injury, has no reason to believe that negligence was present" (App. A, *infra*, 10a). The court's suggestion is difficult to accept, as the facts of this case demonstrate.

The court of appeals applied its "different rule" in this case because of "the government's repeated de-

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ing parallel" to those in *Hammond* v. *United States*, 388 F. Supp. 928 (E.D.N.Y. 1975), a suit charging the federal government with negligent issuance of a batch of polio vaccine that caused the claimant to contract polio, the Ninth Circuit affirmed on the basis of the reasoning in the *Hammond* opinion. In *Hammond* the district court, applying what it termed "the less stringent standard set by the Federal courts in malpractice cases" (388 F. Supp. at 932), held that the claim accrued when the victim learned, through discovery in his action against the private manufacturer of the vaccine, that the vaccine had caused his polio and that the federal government was responsible for setting test standards and controlling the issuance of the vaccine, including the unsafe batch that injured him. The victim then knew the injury and its cause and knew that the federal government had participated in the process. "From that point on," the court held, "it was incumbent upon [the claimant] to investigate, to pursue the discovery for any other acts which would have comprised a *breach of* [the government's] *duty*." 388 F. Supp. at 933 (emphasis in original). It rejected the victim's suggestion that the claim accrued later, when he first learned from a decision of another court that he could sue the United States for negligent issuance of unsafe polio vaccine or when he first learned of the government's "particular acts of 'malpractice.'" 388 F. Supp. at 932, 933.

nials of causation," the "technical complexity" of the malpractice issue, and the fact that before June 1971 none of respondent's physicians told him that neomycin should not have been administered (App. A, *infra*, 11a). The findings of the district court show, however, that beginning in September 1969 respondent consistently insisted in dealing with the VA that administration of the drug caused his deafness, as a private ear specialist had told him (App. B, *infra*, 26a-29a). He was not deterred by the VA's denials.[9] Although the malpractice issue may have been "technically complex," this case is hardly distinguishable on that ground from any number of tort cases in which negligence may be a complicated issue, requiring the testimony of expert witnesses.[10] Finally, in

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[9] The district court relied also on the VA's denial of negligence, but offered no real explanation for its decision to attach significance to the VA's denials of liability. Because denial of liability is frequent (indeed, perhaps almost inevitable) when a potential defendant is confronted with an initial accusation that it caused harm, a court could not make such denials significant without substantially discarding statutes of limitations. If a denial of liability tolls the running of the statute, any suit is timely so long as it is brought within two years of the most recent allegation and denial.

The court may have had in mind the rule that a defendant's actively misleading the victim about the facts of its conduct may sometimes toll the statute of limitations. See, *e.g.*, *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, No. 77-598 (June 19, 1978) (Burger, C.J., concurring). But see *Munro* v. *United States*, 303 U.S. 36 (1938). But no court has held that, when the facts of an event are undisputed, the defendant's simple denial of legal liability tolls the statute of limitations.

[10] Indeed, the question of liability here involves only the application of medical knowledge to essentially undisputed facts. The medical question is a good deal simpler than those

relying on the "factor" that respondent did not obtain a professional opinion before June 1971 that he might have a malpractice case, the court of appeals indulged in circular reasoning. It could not properly rely on this circumstance as a reason to support the legal rule that the period of limitations did not begin to run at some earlier date, when knowledge of causation and injury became sufficient to put a reasonable person on notice that malpractice was a possibility.

The district court's findings establish that, more than two years before he filed his claim, respondent knew that he had gone into the hospital for a leg operation and been made deaf by a drug administered to him following that surgery. If this knowledge is insufficient to start the running of the statute of limitations, then not many cases will escape this category to which the "different rule" created by the court applies.

4. In fiscal year 1977, VA employees in VA facilities treated 1,239,085 hospitalized patients and handled 14,675,284 outpatient visits. United States Veterans Administration, *1977 Annual Report* 9. The figures for fiscal year 1978 are comparable. During each of those years more than five hundred medical malpractice claims were filed with the VA; court actions alleging VA malpractice totalled 186 in fiscal

encountered in cases of negligent surgery or negligent anesthesia, in which the facts about the case may be difficult to ascertain and questions of the probabilities of harm given different approaches to the treatment may predominate. The question of liability here is certainly much more simple than the question of liability in a case involving negligent manufacture of vaccine or negligent design of an automobile.

year 1977 and 213 in fiscal year 1978. (The figure for 1978 suits includes those filed prematurely, without a prior administrative claim.)[11] The United States also is liable under the Tort Claims Act for injuries negligently inflicted on military dependents treated in military medical facilities and patients treated by United States Public Health Service officers and employees. Approximately two hundred suits alleging medical malpractice by employees of agencies other than the VA were brought during each of the past two fiscal years.[12] Resolution of the question raised here thus could affect hundreds of claims and suits each year, including stale claims that might not have been filed at all but for the encouragement given by the substantial relaxation of the limitations period for medical malpractice claims typified by decisions such as the present one.

[11] With the exception of the figures cited to the VA's *Annual Report*, these statistics were compiled from internal records of the Department of Justice and the VA.

[12] These figures, derived from internal records of the Department of Justice, do not include suits concerning swine flu vaccine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1978

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 77-2388

WILLIAM A. KUBRICK, APPELLEE

v.

UNITED STATES OF AMERICA, APPELLANT

Argued June 7, 1978

Decided July 27, 1978

Before ADAMS, WEIS and GARTH, Circuit Judges

OPINION OF THE COURT

WEIS, Circuit Judge.

Because of the unusual factors associated with the discovery of harm caused by medical malpractice, federal courts have adopted a flexible interpretation of the limitation period for filing a claim under the Federal Tort Claims Act. In this case, the plaintiff contended at an early date in administrative proceedings that a drug prescribed by a Veterans Administration physician had destroyed his hearing. However, it was not until some years later that he learned it was negligent to administer the drug as was done in his treatment. The district court, holding that the limitation period did not begin until the plaintiff learned of the malpractice, entered judgment in his

favor against the government. We affirm, but remand for the limited purpose of applying a statutorily mandated set-off.

Alleging injury received as a result of medical malpractice by the Veterans Administration, the plaintiff filed suit under the Federal Tort Claims Act. 28 U.S.C. § 2674 (1976). After trial, the district court entered judgment in his favor in the amount of $320,-536 and the government appealed.

On April 2, 1968, the plaintiff entered the Wilkes-Barre Veterans Administration Hospital for treatment of osteomyelitis—a bone infection—in the right leg. After surgery, a Veterans Administration physician ordered that a solution of the antibiotic, neomycin, be used to irrigate the wound. On April 30, 1968, plaintiff was discharged from the hospital, and about a month later began to notice a loss of hearing, accompanied by an increasing ringing sensation in his ears. An ear specialist in Scranton, Pennsylvania verified a hearing impairment. In November of that year, plaintiff consulted an ear specialist in Philadelphia, Dr. Joseph Sataloff, who confirmed the diagnosis of bilateral nerve deafness. After reviewing the Veterans Administration Hospital records, Dr. Sataloff told the plaintiff that neomycin is an ototoxic drug—that is, one which can impair hearing—and that this either was or probably was the cause of his hearing problem. At the trial, it was controverted whether Dr. Sataloff had told the plaintiff that there was an "excellent chance" that neomycin had caused the hearing loss or had stated causation in a more unequivocal fashion. However, the doctor testified that he did not

state or imply there was negligence in the administration of the drug.

In April, 1969, Kubrick filed for an increase in disability benefits under 38 U.S.C.A. § 351 (Supp. 1978),[1] alleging that neomycin had caused his deaf-

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[1] § 351. Benefits for persons disabled by treatment or vocational rehabilitation

> "Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Veterans' Administration, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28, United States Code, or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28, United States Code, by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise."

Plaintiff was receiving a pension for partial disability because of a back injury received while on active duty with the United States Army in Korea.

ness but making no mention of malpractice. The plaintiff had a twelfth-grade education, and no training in the medical field. He had the claim prepared by a service officer of the Disabled American Veterans. In August of 1969, a Veterans Administration Board of Physicians denied the claim, finding no causal relationship between the neomycin and the hearing loss. The Board also declared there was no evidence of carelessness, error in judgment, or lack of proper skill on the part of the Veterans Administration. The following month, a Veterans Administration adjudication officer told plaintiff that his claim had been denied because the hearing loss was not attributable to his treatment by the Veterans Administration. On September 25, 1969, the plaintiff filed a "Statement in Support of Claim" which he and his wife had prepared, asserting that the neomycin had caused his deafness; the Veterans Administration again denied the claim. After obtaining statements from the Public Health Service and an ear specialist stating that neomycin could be ototoxic, plaintiff wrote to various public officials pleading for help in obtaining disability benefits. These letters did not change the position of the Veterans Administration, which continued to deny a connection between the administration of the neomycin and the plaintiff's deafness.

On May 20, 1971, the Veterans Administration sent plaintiff a copy of one of its field investigator's reports, which purported to quote Dr. Soma, the first ear specialist plaintiff consulted after his discharge

from the Veterans Hospital. According to the investigator, Dr. Soma said that the plaintiff's problem stemmed from his employment in a machine shop. Angered by this report, plaintiff confronted Dr. Soma on June 2, 1971, a date critical in the resolution of this case. The physician denied making the statement attributed to him, and said, furthermore, it was his opinion neomycin never should have been used and that it was the sole cause of plaintiff's hearing disability. During a visit to Dr. Sataloff several weeks later, plaintiff asked the physician if there was anything that could be done. Dr. Sataloff suggested plaintiff see an attorney, and, upon learning he did not have a lawyer, the doctor recommended one. Until that time, plaintiff had not sought legal assistance.

The Board of Veterans Appeals once again denied plaintiff's claim on August 9, 1972; one month later he filed suit in the district court. Discovering the necessity of filing an administrative claim to comply with the Tort Claims Act, plaintiff filed the Standard Form 95 [2] in January, 1973. The claim was denied

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[2] 28 C.F.R. § 14.2 provides:

> "For purposes of the provisions of section 2672 of Title 28, United States Code, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident. If a claim is presented

in April, 1973, and the action proceeded in the district court.

The district judge made extensive findings of fact, establishing that the Veterans Administration had been negligent in prescribing neomycin for plaintiff's treatment. The court also found that the two year period of limitations did not begin to run until the plaintiff visited Dr. Soma in June, 1971, when he learned for the first time that administration of neomycin had been improper. Stating that plaintiff's deafness was irreversible and had resulted in serious emotional problems, as well as loss of employment, the court awarded damages in the sum of $320,536.

The government does not contest either the finding of malpractice or the amount of damages awarded [3], but confines its attack to two points—the limitations period specified by 28 U.S.C. § 2401(b),[4] and the district court's failure to set off veterans benefits received against the verdict.

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to the wrong Federal agency, that agency shall transfer it forthwith to the appropriate agency."

Because the regulation specifies terms upon which the government has consented to be sued, we have held that compliance is necessary. *See Bialowas* v. *United States*, 443 F.2d 1047 (3d Cir. 1971).

[3] Because neither issue is relevant to this appeal, we do not discuss them here. A full explication, however, is found in the district court's opinion, reported in *Kubrick* v. *United States*, 435 F.Supp. 166 (E.D.Pa. 1977).

[4] Section 2401(b) states:

"A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such a claim accrues or unless action is begun within six months after

The government concedes that medical malpractice cases are a recognized exception to the rigid rule under the Federal Tort Claims Act that a claim accrues at the time of the plaintiff's injury. This court and courts of appeals in other circuits have held that the two-year limitations period does not begin to run until the claimant has discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice upon which his claim is based. *Tyminski* v. *United States*, 481 F.2d 257, 263 (3d Cir. 1973). This interpretation was adopted to avoid the harshness in many instances of time-barring an individual's claim before he realized that he had been the victim of malpractice. *See, e.g., Quinton* v. *United States*, 304 F.2d 234 (5th Cir. 1962).

The test of "discovery of the existence of the acts of malpractice upon which the claim is based," while apparently precise, has proved to be troublesome in application. In many cases, the problem centers upon determining when the plaintiff discovered the substance or condition which actually caused his injury. Thus, in *Tyminski* v. *United States, supra*, not until the plaintiff learned that his paralysis was caused by surgical error, rather than the natural progression of a preexisting condition, did the limitation period

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the date of mailing, by certified or registered mail, of notice of final determination of the claim by the agency to which it was presented."

begin to run. In *Caron* v. *United States*, 548 F.2d 366 (1st Cir. 1976), the limitation period commenced when parents learned that an improper injection given while she was an infant caused brain damage to their 12-year-old daughter. *See also Portis* v. *United States*, 483 F.2d 670 (4th Cir. 1973) (neomycin improperly administered in 1963, causing deafness, not recognized as the culprit until 1969); *Toal* v. *United States*, 438 F.2d 222 (2d Cir. 1971) (pantopaque dye left in spinal column after myelogram discovered years later to be cause of brain inflammation).

These cases, however, are not precisely on point because here, the plaintiff was aware a few months after his hearing loss began that neomycin was most likely responsible for his hearing problem. A fact situation quite similar was present in *Jordan* v. *United States*, 503 F.2d 620 (6th Cir. 1974). In that case, the plaintiff underwent surgery on his nose in a Veterans Administration Hospital in order to correct a sinus condition. His eye was damaged during the operation, and a few days later, a staff physician told him the procedures required to deal with the unanticipated "severity" of the sinus condition caused the injury. Three years later, during a periodic examination, a physician told plaintiff it was "too bad they screwed up your eye when they operated on your nose." Plaintiff then retained a lawyer and brought suit against the government. The Court of Appeals for the Sixth Circuit held that the limitation period did not begin to run until plaintiff learned of the malpractice. As the court phrased it:

> Implicit in the federal cases applying this "discovery" rule is the requirement that the claimant must have received some information, either by virtue of acts he has witnessed or something he has heard, or a combination of both, which should indicate to him when reasonably interpreted in light of all the circumstances, that his injury was the result of an act which could constitute malpractice. *Id.* at 622.

The *Jordan* opinion reflects that although the plaintiff knew his eye injury was attributable to the surgery performed on his nose, he was not aware that the procedure constituted malpractice.

Bridgford v. *United States*, 550 F.2d 978 (4th Cir. 1977), is also instructive. There, the court held that the limitation should not begin "until a claimant has had reasonable opportunity to discover *all* of the essential elements of a possible cause of action—duty, breach, causation, damages." *Id.* at 981-82 (emphasis in original). This approach was also adopted by the Court of Appeals for the Tenth Circuit in *Exnicious* v. *United States*, 563 F.2d 418, 420 (10th Cir. 1977).

Here, the district court said that the limitation period does not begin to run even though the patient perceives the relationship between treatment and injury, if despite due diligence, he has no reason to believe there was any negligence. The government contends such a standard allows a plaintiff to delay the claim's accrual date until he discovers that there was legal negligence, or carried to its extreme, "when he gets a professional medical opinion that medical malpractice was involved—*i.e.*, that he should file a

lawsuit." (Government Brief at 41). We do not believe this to be an accurate assessment of the court's rationale because it ignores a subsequent passage in the court's opinion saying that the claim period begins to run when "the plaintiff had reason at least to suspect that a legal duty to him had been breached." 435 F.Supp. 166, at 185.

In most cases, knowledge of the causal connection between particular matters of treatment and injury, without more, will or should alert a reasonable person that there may have been an actionable wrong. But in the few instances where a patient, although aware of the nexus between treatment and injury, has no reason to believe that negligence was present, a different rule applies. In these situations, if the plaintiff can prove that in the exercise of due diligence he did not know, nor should he have known, facts which would have alerted a reasonable person to the possibility that the treatment was improper, then the limitation period is tolled. For example, the plaintiff in *Jordan*, whose eye was injured as a result of his sinus operation, may very well have believed that such eye involvement was an unavoidable result of the operation, and indicated no impropriety in the manner of treatment. In such a case, the cause of action for medical malpractice should not accrue upon mere knowledge of causation. Something more should be required. Any other result would be inequitable and contrary to the "blameless ignorance" rationale underlying the *Quinton* discovery rule.

The test necessarily must be applied on an ad hoc basis, but it does require consideration of subjective,

as well as objective standards. Thus, in *Sanders* v. *United States*, 179 U.S.App.D.C. 272, 551 F.2d 458 (1977), the limitation period was not tolled despite the plaintiff's assertions that she did not know of the connection between her injury and earlier treatment. In denying recovery, the court relied upon the facts that plaintiff was a registered nurse and had gained possession of her hospital records soon after the treatment. *See also Reilly* v. *United States*, 513 F.2d 147 (8th Cir. 1975).

In the case *sub judice*, the district court found that the plaintiff suspected negligence only after the June, 1971 interview with Dr. Soma. The trial judge also held that plaintiff's prior belief that there was no malpractice was reasonable in view of several other factors: the technical complexity of the question whether his neomycin treatment involved excessive risk, the failure of any of his doctors to suggest before June, 1971 the possibility of negligence, and the government's repeated denials of causation.

The government argues, however, that the various claims submitted by the plaintiff in his correspondence are inconsistent with his position at trial. The plaintiff testified that he thought he was entitled to an increased disability allowance as a result of the neomycin treatment even though no fault of the Veterans Administration existed. He knew that a veteran was entitled to receive benefits for injury incurred on active duty without regard to fault, and he assumed the same rule applied to injury received while a patient in a government hospital. Plaintiff also testified

that in his various letters and memoranda sent to the Veterans Administration which referred to "mistake" and "error," he meant the error in denying him disability benefits.

We have reviewed the extensive correspondence from the plaintiff and find that it is ambiguous and capable of the meaning attributed to it by the plaintiff. We observe, also, that plaintiff was cross-examined thoroughly by government counsel and was questioned sentence-by-sentence on many passages in the correspondence. The issue is one of fact. What the plaintiff intended to express in the correspondence and what he thought about the possibilities of malpractice were questions to be resolved by the trial judge. We may not reverse his findings unless they are clearly erroneous, *Tyminski* v. *United States*, 481 F.2d at 263; F. R. Civ. P. 52(a), and we do not find them to be so.

The plaintiff knew or should have known that neomycin was the direct cause of his hearing loss. He did not, however, know that the administration of the drug was medical negligence. Thus, he knew two of the essential elements of a possible cause of action—causation and damages—but he did not know, nor could he reasonably have been expected to know, according to the district court's findings, of the breach of duty on the part of the government. In these circumstances, the limitation period did not run until Dr. Soma's conversation suggested a duty had been breached by the Veterans Administration.

The administrative claim was filed by the plaintiff on January 13, 1973, well within the two-year period

after the June 2, 1971 confrontation with Dr. Soma. The relevant statute, 28 U.S.C. § 2401(b), applies the two-year period to the filing of the administrative claim rather than the institution of suit. In this case, the suit was filed at an earlier date. We agree with the district court's conclusion that where the administrative claim is denied before any substantial progress has been made in the pending litigation, the suit need not be refiled to be effective. The government does not contend otherwise on this appeal. *Cf. Rosario* v. *United States*, 531 F.2d 1227 (3d Cir.), *cert. denied*, 429 U.S. 857, 97 S.Ct. 156, 50 L.Ed.2d 135 (1976). To hold that refiling was necessary would involve duplicitous pleadings and wasted effort.

We conclude, therefore, that the district court did not err in finding that the claim was timely filed.

THE SET-OFF

On July 15, 1975, the Veterans Administration Board of Veteran's Appeals reversed itself and determined that the plaintiff was entitled to an increase in his disability rating as a result of the neomycin administration. Since that time, the plaintiff has been paid in excess of $50,000 in augmented disability benefits. The government contends that these payments should be set off against the judgment. The plaintiff asserts that the issue was not raised during the trial and, therefore, was waived. We do not accept that position. Government counsel discussed the issue during a pretrial conference, stating that set-off was compelled by statute.

Since the increase in benefits was compensation for the very same injury for which the judgment was awarded, the set-off should be allowed. 38 U.S.C. § 351 was amended in 1962 to provide that once a judgment is entered against the government in an action under the Federal Tort Claims Act for a disability which was also the subject of an award in pension benefits, no pension benefits shall be paid until the aggregate amount of augmented benefits payable equals the total amount of the judgment. The legislative history makes clear that Congress intended to prevent double payment for the same injury. 1962 U.S. Code Cong. & Admin. News, pp. 3260, 3268. For case law to the same effect, *see United States* v. *Brown*, 348 U.S. 110, 111, 75 S.Ct. 141, 99 L.Ed. 139 (1954); *Brooks* v. *United States*, 337 U.S. 49, 53-54, 69 S.Ct. 918, 93 L.Ed. 1200 (1949); *Steckler* v. *United States*, 549 F.2d 1372, 1379 (10th Cir. 1977). *See also* L. Jayson, Handling Federal Tort Claims § 159 (1977). The Veterans Administration has not been given any discretion to waive the statutory direction and it must be followed.

Because the augmented pension benefits have already been paid, it will be necessary to reduce the amount of the judgment by the amounts paid to the date the set-off is applied. Accordingly, the case will be remanded to the district court for this limited purpose. In all other respects, the judgment will be affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. PENNSYLVANIA

Civ. A. No. 72-1815

WILLIAM A. KUBRICK

v.

UNITED STATES OF AMERICA

July 22, 1977

OPINION AND ORDER

EDWARD R. BECKER, District Judge.

I. *Preliminary Statement*

This is a medical malpractice case brought under the Federal Tort Claims Act, 28 U.S.C. § 1346 ("Act"), raising important questions concerning the statute of limitations and the standard of care applicable to specialists in Pennsylvania. The claim arises out of the hospitalization of the plaintiff, William A. Kubrick, in the Wilkes-Barre Veterans Administration Hospital ("VA Hospital") from April 2, 1968 to April 30, 1968, for treatment of osteomyelitis of the right femur. Following surgery, the infected area was irrigated for twelve to thirteen days with a 1% solution of neomycin sulfate administered through a hemovac (evacuation) tube system. The osteomyelitis cleared, but approximately three months after his discharge from the VA Hospital

plaintiff began to notice a partial hearing loss and tinnitus (ringing in the ears). His condition grew progressively worse, and there is now no dispute about the fact that plaintiff suffers from severe bilateral sensorineural hearing loss, or nerve deafness, which is permanent in nature and which cannot be improved by treatment.

The evidence overwhelmingly supports plaintiff's contention that his nerve deafness was caused by the administration of neomycin which, while a highly effective antibiotic, is also ototoxic, *i.e.*, deleterious to the eighth cranial nerve which supplies the ear. The government does not seriously dispute this contention. What is at issue in this case is whether, at the time of the treatment, it was sufficiently well known in the Wilkes-Barre (or similar) medical community, or, alternatively, in the national community of orthopedists, that neomycin administered as a surgical wound irrigant through a hemovac tube system had ototoxic effects such that its administration to plaintiff was negligent. In order to resolve this issue we must determine whether Pennsylvania would apply a national or similar locality standard to specialists,[1] and we must also examine what was known about the *manner* of administration of the drug, focusing in particular upon the medical distinction between "topical" use of a drug, which imports local application and effect, and "parenteral" use, by which a systemic effect is intended.

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[1] *See* Discussion at pp. 186-188 *infra*.

It is conceded by the government that the ototoxic effects of neomycin when *parenterally* used were generally known in April 1968. The government contends, however, that the use of neomycin as a surgical wound irrigant through a hemovac tube system was then thought to be a *topical*, not a parenteral use, and concomitantly, that the body's capacity to absorb neomycin when administered in this way was known little, if at all, at that time. The government argues that the plaintiff's VA physician thus cannot be charged with the knowledge that the neomycin was readily absorbed into the body tissues and the blood stream. It further argues that the practices followed in this case were those generally followed at the time, at least in Wilkes-Barre and similar communities, hence malpractice was not committed.

The plaintiff counters that the absorption propensity of neomycin was widely known and that the VA physician who treated him is chargeable with that knowledge. Plaintiff also argues that the dosage of neomycin administered to him was so outrageously high and prolonged that the treating physician in any event should have known of the ototoxic potential. Plaintiff also submits that other nontoxic drugs could have adequately treated the osteomyelitis, which was caused by a staphylococcus infection.

As the foregoing recitation suggests, the trial record is heavily laden with the (conflicting) testimony of expert medical witnesses as to just what was known in the medical community about the properties of neomycin and with excerpts from the medical

literature at the time. With respect to the evidence in the medical literature of neomycin's absorption potential, the government argues that the VA doctors are not obliged to read every piece in the vast and burgeoning medical literature.

As will appear from the findings of fact and discussion which follow, we find: (1) that the plaintiff's VA physician is chargeable with what we find to have been generally available knowledge of both the body's ability to absorb neomycin when administered as it was to the plaintiff, and its potential ototoxic effect; (2) that the dosage given the plaintiff was excessive; (3) that drugs other than neomycin could and should have been used to treat the staph infection; and (4) that the hemovac tube system was not properly maintained. Accordingly, we conclude that the VA physician in charge was guilty of medical malpractice which proximately caused plaintiff's bilateral hearing loss.

The liability aspect of this case, however, has another facet. For what is also at issue is whether plaintiff's suit is time-barred by the Act's two-year statute of limitations. 28 U.S.C. § 2401(b).

The plaintiff experienced tinnitus and first noticed a diminution of his hearing in June 1968. Thereafter, he visited a series of otologists about the progressively worsening hearing loss. At some point during the consultations the plaintiff was advised of the possibility that it was the neomycin which caused it. In April 1969 plaintiff submitted a claim to the Veterans Administration seeking disability benefits to

compensate him for his hearing loss on the basis of the opinion of a Philadelphia ear, nose and throat specialist that it was "highly possible" that the neomycin had caused plaintiff's tinnitus and deafness. In August 1969, the VA denied plaintiff's claim on the basis that there was no causal relationship between the neomycin administration and the hearing loss, and also for the reason that there was no evidence of negligence of any sort on the part of the government. Thereafter plaintiff instituted various requests for reconsideration and appeals, in the belief that even without negligence he was entitled to an increase in disability payments. In addition, he wrote to various public officials in aid of his efforts to obtain vindication before the Veterans Appeals Board.

It was not until June 1971, that plaintiff discovered, upon the opinion of an ear specialist, that the government's administration of neomycin may have been negligent. This suit was filed in September 1972. In January 1973, plaintiff filed a form 95 administrative claim which was rejected a few months later in April 1973. Before that and for a long period thereafter, the VA unequivocally maintained that there was no negligence.

The government has moved to dismiss on the grounds that the statute of limitations had expired prior to the filing of an administrative claim, and that in any event plaintiff had failed to file a standard form 95 (administrative) tort claim in the proper sequence. The Act's statute of limitations reads:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years *after such claim accrues*. [28 U.S.C. § 2401(b) (emphasis added).]

The critical statute of limitations issue in this case is, therefore, when plaintiff's claim accrued, and we shall discuss the applicable standard below. It will be necessary, in the course of that discussion, to analyze and refine the prevailing rule in such matters.

As the foregoing discussion suggests, the government asserts that the claim accrued in the summer of 1968, when plaintiff first noticed his hearing loss, or at least in April 1969 when he submitted a claim to the VA evincing knowledge of the high possibility that the neomycin administration caused his deafness. In either event, the present suit would be time-barred.

The plaintiff, on the other hand, contends that it would be harsh and improper to construe the statute of limitations so as to hold that plaintiff's claim accrued at a time when he had every reason to believe, based *inter alia* upon the VA's own written opinions, that there was no causal relationship between the neomycin administration and the hearing loss, and no negligence on the part of the government. In plaintiff's view the claim did not accrue (hence the statute of limitations did not start to run) until plaintiff, in the exercise of reasonable diligence, could have suspected that he was the victim of improper medical care or negligence. This occurred,

plaintiff says, in June 1971, nineteen months prior to the filing of his administrative claim.

For the reasons which will appear in the findings of fact and in the discussion which follows, we conclude that plaintiff's suit does not run afoul of the statute of limitations or the administrative filing requirements. Finding that defendant has committed malpractice and that plaintiff is irreversibly deaf (though he is an excellent lip reader) and has suffered related psychiatric problems, we will award substantial damages. This opinion constitutes our findings of fact and conclusion of law under Fed.R. Civ.P. 52(a).

II. *Findings of Fact*

A. *Plaintiff's Hospitalization and Treatment*

On April 2, 1968, the plaintiff, who then possessed full normal hearing, was admitted to the VA Hospital in Wilkes-Barre for treatment of a condition which was diagnosed as osteomyelitis of the right femur. He thereupon came under the primary care of Dr. H. P. Wetherbee, an orthopedic surgeon employed by the VA.

On April 3, 1968, Dr. Wetherbee operated on the plaintiff. The operative procedure disclosed a small pocket of purulent material along the shaft of the right femur. A swab was taken of the purulent material for smear, culture and sensitivity studies. During the operative procedure, two hemovac tubes were introduced into the depths of the wound, one proximally and the other distally. Thereafter the

surgical wound was closed loosely and a dry sterile dressing applied.

The culture test performed on the purulent material indicated that the organism present was a beta hemolytic staphylococcuscoagulase positive (hereinafter referred to as "staph"). Sensitivity tests taken revealed that the staph was susceptible to treatment with the following medication: oleoan; terramycin; tetracyline; chloromycetin; penicillin; streptomycin; prostaphlin; erythromycin; polycillin; furadantin; novobiocin; mandelamine; neomycin; kanamycin; keflin; lincocin and daotriacetyloleandomycin. On April 5, 1968, Dr. Wetherbee prescribed two antibiotics to treat the osteomyelitic condition: polycillin orally and neomycin as a surgical wound irrigant administered through the use of the hemovac tubes.

At 4:00 p.m. on April 5, 1968, a 1% neomycin drip, at the rate of sixty (60) drips per minute was begun, and continued twenty-four (24) hours a day until April 18, 1968. At that rate plaintiff could have received as much as 5,760 cc. of 1% neomycin solution during each twenty-four hour period; and in any event, he did receive at least 4,320 cc. of 1% neomycin solution during each twenty-four hour period. This translates to at least 43.2 grams of neomycin during any twenty-four hour period. Thus, plaintiff was administered at least 549 grams and perhaps as much as 732 grams of neomycin during his hospitalization in April 1968. Plaintiff remained in the hospital until April 30th. When he was discharged on that date the osteomyelitis had cleared.

B. *Plaintiff's Loss of Hearing and the Accrual of His Claim*

In mid-June 1968, plaintiff first noticed a ringing sensation in his ears and some loss of hearing. He sought medical care by visiting his family doctor, Dr. Mazaleski, who in turn referred him to an ear specialist, Dr. Soma, in Scranton, Pennsylvania. On August 27, 1968, Dr. Soma performed an audiometric test on plaintiff and formed the opinion that the ringing sensation and loss of hearing was due to bilateral nerve deafness of unknown etiology.

On September 9, 1968, plaintiff was examined by another ear specialist, Dr. Cole of Geisinger Medical Center in Danville, Pennsylvania. Dr. Cole, after examination and an audiometric test, diagnosed the hearing loss and ringing sensation as bilateral sensorineural deafness. On September 10, 1968, plaintiff returned to the VA Hospital ear, nose and throat clinic, where he informed a Dr. Fischoff of the ringing sensation and loss of hearing. Dr. Fischoff administered an air conduction test. Plaintiff was not informed of the results of the test, but was sent to the dispensary for a prescription to help his condition. The plaintiff was still bothered by the ringing sensation and hearing loss which was becoming progressively worse, and in November 1968, was examined and tested by Dr. Joseph A. Sataloff, an ear, nose and throat specialist in Philadelphia. Dr. Sataloff, after physical examination and an air conduction test, opined that plaintiff was suffering from bilateral hearing loss. Dr. Sataloff told plaintiff he

would try to reduce the ringing sensation and impede the continued degeneration of hearing loss, and that he would also send for the VA hospital records in an effort to find their etiology. This commenced a series of visits with Dr. Sataloff for treatment of plaintiff's hearing condition that continued until the summer of 1971.

Dr. Sataloff testified that he informed plaintiff during his initial visit, and during many visits thereafter, that the antibiotics he had received during his hospitalization in April of 1968 had caused his hearing problems. We do not credit this testimony. Instead we find that Dr. Sataloff told plaintiff and reported to the Veterans Administration, insurance companies, and others that it was his opinion that it was "highly possible" (or other similar language) that the hearing loss was caused by the neomycin solution given in the Veterans Administration Hospital. For instance, on June 30, 1969, Dr. Sataloff completed and submitted a certificate of attending physician for the Veterans Administration in which he stated "[t]here is an excellent chance that Mr. Kubrick's present hearing loss is the result of neomycin toxicity." This submission followed the filing by plaintiff on April 16, 1969, of a claim to the Veterans Administration for disability benefits to compensate him for his hearing problems based upon Dr. Sataloff's opinion that the neomycin had been the "possible" cause of his deafness.[2] We find that at no

[2] On September 16, 1969, Dr. Sataloff had written to Mr. Peter Dudish of the Disabled American Veterans in Wilkes-Barre stating that "[t]here is a very excellent possibility that his hearing damage could have been due to the use of neomycin by irrigation." As will more fully be seen, and as we now note, plaintiff's persistence in his disability claim evidences his view that he was entitled to such payments purely on the basis of the causal relationship.

time prior to mid-1971 did Dr. Sataloff advise or in any way indicate to the plaintiff by word or writing that there was malpractice or negligence in the administration of neomycin at the VA Hospital in April 1968. We also find that it was reasonable for plaintiff to continue to believe, even after consultation with Dr. Sataloff, that his deafness was not the result of malpractice in view of the technical complexity of the question whether his neomycin treatment was unduly hazardous.

On August 11, 1969, a Veterans Administration Board of Physicians was convened to consider whether plaintiff's hearing loss had any relationship to the use of neomycin during the period of his hospitalization in April 1968. The Board thereafter informed plaintiff that his claim had been denied on the basis that no casual relationship existed between the neomycin administration and the hearing loss, as well as for the reason that there was no evidence of "carelessness, accident, negligence, lack of proper skill, error in judgment, or any other fault on the part of the Government." Moreover, on September 5, 1969, Mr. McCauley, the Adjudication Officer in the Veterans Administration Center at Philadelphia, advised the plaintiff that the Veterans Administration had found that his hearing loss was not attributable medicinally

or medically to his April 1968 hospitalization, and that his claim for compensation as a result of his hearing loss was therefore disallowed.

On September 25, 1969, plaintiff submitted a "Statement in Support of Claim" in which he expressed his disagreement with the Veterans Administration's denial, stating that Dr. Sataloff had requested and reviewed all past and medical history and had informed him that the medication given him during his hospitalization in April 1968 was responsible for his loss of hearing. On September 26, 1969, the Veterans Administration issued a "Statement of the Case" in plaintiff's appeal which again declared that plaintiff's claim was denied due to lack of causal relationship and a lack of evidence showing carelessness, accident, negligence, lack of proper skill, error in judgment, or any other fault.

On January 13, 1970, plaintiff was admitted to the VA Hospital in Wilkes-Barre, and remained as an in-patient until February 16, 1970. During that time, a complete audiometric examination by the ears, nose and throat clinic confirmed the fact that he suffered from a severe bilateral sensorineural hearing loss which completely foreclosed speech discrimination and for which a hearing aid would be of no assistance.

An important development in the history of this matter occurred on May 20, 1971, when the Veterans Administration sent plaintiff a "Supplemental Statement of the Case" containing the following report

of a Veterans Administration field examiner, J. A. Nagy:

> VA field examination report: Dr. J. J. Soma stated after examining the veteran on August 27, 1968, he concluded that the Veteran's problem was a result of his employment in the machine shop. He stated he planned on treating the veteran along such lines, but he never came back for further treatment.

That Veterans Administration Statement identified two reasons for denial of compensation for plaintiff's hearing loss:

> The additional evidence including the current Veterans Administration examination does not show any veteran's hearing disability was due to any carelessness, lack of medical skills, negligence or error in judgment, mal-practice or other knowledge on the part of the staff of the Veterans Administration Hospital.
>
> The Veteran's own ear, nose and throat specialist indicated that the hearing loss was felt to be due to the veteran's previous employment as a machinist and was due to acoustic trauma.

On June 2, 1971, plaintiff confronted Dr. Soma in his office with the opinion attributed to him in the VA's Supplemental Statement of the Case. Dr. Soma, upon examining the Supplemental Statement, informed the plaintiff that the statements attributed to him were never made by him. At that juncture, Dr. Soma advised plaintiff that it was his opinion that neomycin should not have been administered in April 1968, and that plaintiff's permanent hearing

loss was solely caused by neomycin absorption. Dr. Soma's statement to plaintiff on June 2, 1971, was the first time that any doctor or lay person had suggested to plaintiff and/or his wife that negligence was involved in the administration of neomycin by the Veterans Administration Hospital physician in April of 1968. Plaintiff thereafter retained counsel who represented him before the VA Board of Appeals and later in the present lawsuit.

In the period between the denial of plaintiff's initial claim and the summer of 1970, plaintiff and his wife had written various letters to the Veterans Administration officials and to their United States Senators in which they contradicted and denied the VA's finding of no causal connection between the administration of the neomycin solution in April of 1968 and the subsequent development of the hearing loss sustained by the plaintiff. The government makes much of the language of some of those letters,[3] sug-

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[3] On December 10, 1969, plaintiff wrote to United States Senator Richard S. Schweiker, complaining about the Veterans Administration's denial of his claim for benefits and contending that he was "turned down by the Veterans Administration . . . who maintain their hospitals are not capable of error or misjudgment. . . ." On December 29, 1969, plaintiff submitted a six page appeal of his claim to the Board of Veterans Appeals in which he attempted to contradict the findings of the Veterans Administration regarding the hospital procedures, disagreed with the Veterans Administration's conclusion of no negligence, stated his belief that his injury was the "outcome of error," and attempted to convince the Board that Dr. Sataloff's opinion about the causal

gesting that they reflect an awareness by plaintiff that the VA doctor was or may have been negligent. We draw no such conclusion, believing them to represent a flurry of rhetoric induced by desperation. We credit plaintiff's testimony that he did not, prior to his June 1971 interview with Dr. Soma, suspect that there was negligence involved. We find that as of the date of those letters plaintiff believed his entitlement to VA benefits followed if the neomycin administration caused the hearing loss without negligence. Furthermore, plaintiff's belief that there was no malpractice was reasonable in view of the technical complexity of the question whether his neomycin treatment involved excessive risks, the failure of any of his doctors to suggest prior to June 1971 the possibility of negligence, and the repeated unequivocal assertions by the Veterans Administration that there was no negligence on the part of the government.

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relationship was correct. On October 15, 1970, plaintiff signed and sent a letter, written by his wife, to the Administrator of Veterans Administration Affairs, Donald E. Johnson. This letter begins by citing a case in which a friend of Mrs. Kubrick became injured and eventually died as "the result of human error" in a hospital. It goes on to state that plaintiff lost his hearing "as the result of a Medical Error . . ." and suffered the consequence of that error, and suggested that Mr. Johnson could recommend a hospital or doctors capable of correcting the error. And finally, on October 27, 1970, plaintiff wrote to Mr. Clayman of the Veterans Administration in Philadelphia in a further attempt to have the Veterans Administration reverse its decision. This letter stated, in part, that plaintiff "had normal good hearing before this drug had been administered without using proper precautions."

On August 9, 1972, the Board of Veterans Appeals published its "final" decision in which compensation for plaintiff's hearing loss was again denied.[1]

On September 14, 1972, plaintiff's complaint in this Court was filed. Plaintiff did not file a standard form 95 setting forth a claim (administrative claim) against the United States for medical malpractice until January 13, 1973. On April 13, 1973 the (administrative) claim was rejected by letter to counsel for plaintiff from John H. Kerby, Assistant General Counsel for the Veterans Administration.

Plaintiff's persistent efforts to seek vindication before the VA finally bore fruit in the form of a July 15, 1975 decision, upon reconsideration, of the VA Board of Veterans Appeals. The Board entered findings of fact as follows:

> 1. Mr. Kubrick was placed on neomycin irrigation by the Veterans Administration during

[1] The decision found as follows:

> 1. Mr. Kubrick was placed on neomycin irrigation by the VA Hospital during hospitalization in April, 1968 for osteomyelitis of the right femur. Beginning in approximately June, 1968 defective hearing was noted.
>
> 2. Sensorineural deafness was diagnosed during VAH hospitalization from January to February 1970.
>
> 3. That there is evidence to show that defective hearing may have been caused by neomycin irrigation.
>
> 4. The treatment and care afforded the Veteran in connection with use of neomycin was administered by duly qualified and trained personnel, in accordance with acceptable medical practices and procedures, and negligence, error in judgment or other indicated faults are not shown.

> hospitalization in April 1968 for osteomyelitis of the right femur.
>
> 2. Defective hearing was noted in about June 1968 and sensorineural deafness was diagnosed during Veterans Administration hospitalization from January to February 1970.
>
> 3. Defective hearing may have been caused by the neomycin irrigation.
>
> 4. The benefit in issue was denied in Board of Veterans Appeals decision promulgated August 9, 1972, which decision now appears to have been erroneous.
>
> 5. There was fault on the part of the Veterans Administration in the manner of neomycin irrigation which is reasonably determined to have resulted in sensorineural hearing loss.

The Board of Veterans Appeals based its findings of fact upon its evaluation of the facts wherein it stated:

> The Board's finding that the veteran's defective hearing may have been caused by the neomycin irrigation stands and is supported by the evidence. However, a further in-depth review supports the claimant's assertions of improper administration of the drug. The amount utilized was of such quantity, when considered with the size and depth of the wound and the form of drug administration, as to support a finding the procedure deviated from accepted medical practices and procedures, indicating fault on the part of the Veterans Administration based on the data previously on file.

The findings of the Board of Veterans Appeals are recited by way of background. The government

made no such concessions at trial, and, indeed, vigorously disputed the plaintiff's allegations of malpractice. Our findings on that subject are *de novo* without reference to the Board's decision.[5]

C. *Was the Veterans Administration Physician Guilty of Malpractice?*

The drug neomycin was first discovered by Dr. Selman Waksman in 1950. Soon thereafter, it was discovered that the drug had nephrotoxic (kidney damage) and ototoxic (eighth cranial nerve damage) side effects. A substantial body of medical literature, prior to April 1968, warned of the hazard of irreversible ototoxic effects, often including permanent bilateral deafness. As we have noted in our Preliminary Statement, however, the battleground in the malpractice aspect of this case is more narrowly focused, and concerns the knowledge in medical communities similar to Wilkes-Barre and among orthopedists in general, about the absorption propensity of neomycin when used post-operatively in an irrigating solution.

The government offered the testimony of three orthopedic surgeons as expert witnesses: Dr. Richard Godshall, chief of orthopedic surgery at Quakertown and Grandview Hospitals in Bucks County, Pennsyl-

[5] The trial in this case was delayed considerably when, following that decision, the parties negotiated for many, many months with a view towards a total resolution of the case. The negotiations proved unsuccessful. The trial was further delayed for considerable time while plaintiff, having discharged previous counsel, sought new counsel.

vania; Dr. Richard Kaplan, a Philadelphia orthopedic surgeon associated with various teaching hospitals; and Dr. Sanford Sternlieb, an orthopedic surgeon in Wilkes-Barre, Pennsylvania and former instructor at Jefferson Medical School in Philadelphia. Each of the Government's orthopedic experts testified that the procedure employed in administering the neomycin to Mr. Kubrick constituted proper and adequate treatment as of April 1968, and that neomycin was frequently used by orthopedic surgeons practicing in Wilkes-Barre and similar medical communities in 1968 to irrigate and disinfect surgical wounds post-operatively. Each of the government's orthopedic experts testified that although the dangers of ototoxicity when administering neomycin intramuscularly (IM) and intravenously (IV) were generally recognized in their respective medical communities in April 1968, nevertheless, it was not then apparent that any significant potential for absorption existed when the drug was used as a washing agent in a 1% irrigating solution.[6] These experts also testified that the irrigation of plaintiff's surgical wound in April 1968 with the 1% solution of neomycin, for a period of twelve to thirteen days, was appropriate since the practice at the time was to continue the local antibiotic treatment until the patient's fever dropped and the infec-

[6] Dr. Sataloff corroborated their testimony, although he also testified that *he* knew about the problem and that, as early as 1968, he had visited numerous hospitals in Pennsylvania to inform surgeons about the potential ototoxic dangers of neomycin.

tion subsided. Before considering this testimony it will be helpful to summarize the position of plaintiff's experts.

We first identify the common ground between the plaintiff's and defendant's experts. Plaintiff's experts did not take serious issue with the appropriateness of the technique used by Dr. Wetherbee of making a deep surgical wound to facilitate the draining of the infection. Moreover, they agreed that it was appropriate to use an antibiotic in solution as a wound irrigant in a hemovac system to "wash the tissues" and eradicate the infection. Additionally, they did not dispute that neomycin is an effective antibiotic. However, they seriously questioned its use in plaintiff's case.

The threshold medical problem, as plaintiff's first expert, Dr. Linwood Tice, an eminent pharmacologist, described it, was to identify the "drug of choice." Dr. Tice testified that, after the laboratory tests revealed the nature of the offending organism (staph) it was clear that polycillin (ampicillin) or perhaps penicillin, but not neomycin, were the drugs of choice because of the sensitivity of the staph in question to those drugs and the absence of potential side effects.

Dr. Tice's testimony introduced the distinction between the topical and parenteral use of a drug. A typical parenteral use is by IV or IM injection beneath the surface of the skin, where the body tissues will absorb it and it will have a systemic effect. A classical topical use is by application to the skin surface where no such absorption is anticipated. The

parties agree that it was known in 1968 that parenteral use of neomycin implicates grave risk of damage to the eighth cranial nerve and also of severe kidney damage. Dr. Tice testified that the administration of neomycin in water soluble solution in deep tissues, even though as part of an evacuation (hemovac) tube system was a parenteral use because of the absorption of the neomycin into the capillaries and the blood system. Dr. Tice also testified that: (1) according to the VA Hospital records, the hemovac tube system was not functioning properly, increasing the risk of absorption; (2) that the dosage of neomycin was excessive both in terms of hourly amount and duration; (3) that the dangers of *this* use of neomycin were known in the medical community and in the literature in April 1968;[7] and (4) that audiometric tests should have been made during the course of therapy as a precautionary measure.[8]

Another expert witness for the plaintiff was Dr. Thomas Gain, a Philadelphia surgeon associated with

[7] Dr. Tice, as a pharmacologist, testified about the neomycin entry in the 1968 edition of Physicians Desk Reference ("PDR"), the standard reference used by physicians on the properties of different drugs, to which he had contributed. That edition plainly warned of the potential ototoxicity of neomycin, but it does not help with the factual question in this case because it did not address the differential consequences of various ways of administering the drug.

[8] Plaintiff never received an audiometric examination during the course of his Veterans Administration Hospital hospitalization in April 1968. At no time subsequent to the operation on the morning of April 3, 1968, was a blood test, urinalysis or BUN performed; the latter tests would have demonstrated nephrotoxic effects of the drug.

Hahnemann Hospital. Dr. Gain testified that there was no way to construe this irrigation as topical, and that it was plainly parenteral. Illustrations of topical use given by Dr. Gain were applications to external surfaces or mucous membranes, use as a rectal suppository, or in highly limited quantity for "gut" sterilization as a preoperative measure. Dr. Gain described the dosage administered to the plaintiff as "astronomical." He testified that the dangers of the type of administration at issue were well known in 1968, and that the problem was well defined and outlined in the medical literature at that time. Indeed, the systemic absorption problem was sufficiently well known at that time, according to Dr. Gain, that acceptable medical practice involved monitoring of the kidney function and possibly the hearing function during any parenteral use.

Plaintiff's final witness on this subject was Dr. J. David Hoffman, an orthopedic surgeon associated with Jefferson Hospital in Philadelphia. Dr. Hoffman testified trenchantly that by 1968 physicians at Jefferson were keenly aware of the ototoxic dangers of using neomycin in irrigating solution.[9] Moreover, Dr. Hoffman testified that the effect of using neomycin in this fashion was singularly parenteral, not in the strictest sense of direct intramuscular or intravascular introduction, but because of its introduction into an open bloody wound, confined in a cavity deep in the body

[9] Dr. Hoffman also testified that neomycin, even in the mid-1950's, was known to be "notoriously" ototoxic, and to be a virtual "time bomb."

yet adjacent to capillary and lymphatic channels. Dr. Hoffman described the surgically created irrigation system as significantly exacerbating the absorption problem. Under such a system, the tissues are bathed and supersaturated in an airtight closure, but the blood vessels are not closed off. Dr. Hoffman testified that entry of the toxic material into the capillary system was obvious, even from Newton's Laws, and that the dangers of this procedure should have been known by any specialist—anywhere—in 1968.

Dr. Hoffman also testified that the hemovac system was not functioning and that the dosage was extraordinarily high—the "highest profusion" he had ever seen, heightened by the nonfunctioning system. Additionally, he testified that neomycin was not the drug of choice, but that penicillinase or chloromycetin should have been used. In Dr. Hoffman's view (and, he said, that of the staff at Jefferson Hospital), neomycin should be used only in exceptional circumstances, in the case of an extremely resistant mixed infection. Plaintiff was not, he stated, so sick that he needed such a dangerous drug.

We credit the testimony of Dr. Tice, Dr. Gain, and Dr. Hoffman, as related above, and find that the government, acting through Dr. Wetherbee, was negligent: (1) in the choice of neomycin as a drug for treating the plaintiff's condition in 1% solution as a surgical wound irrigant; (2) in administering a considerable overdosage; (3) in failing adequately to monitor the effects of the dosage; and (4) in permitting a malfunctioning hemovac tube system to con-

tinue in operation. Furthermore, we find that Dr. Wetherbee's negligence was the proximate cause of plaintiff's sensorineural deafness.

There was also much testimony as to what had been reported in the medical literature as of April 1968 about dangers of administering neomycin as Dr. Wetherbee did to the plaintiff. The government conceded that in June 1969, an article was published in the New England Journal of Medicine announcing the apparent potential for absorption of neomycin when used in irrigating solution. Although the government concedes that the literature abounded with declarations of the ototoxity of neomycin in other contexts, it contends that this June 1969 article was the first such announcement to the medical community at large of the dangers of using it for irrigation. Plaintiff's experts on the other hand testified that the pre-1968 medical literature, including textbooks, warned of the dangers that neomycin could be absorbed into the system and of the problems involved in using it in irrigating solutions. We credit the testimony of plaintiff's experts that the medical literature as of April 1968 contained sufficient and sufficiently widespread information as to the ototoxicity and absorption properties of neomycin to have warned Dr. Wetherbee of the dangerousness and hence the impropriety of his treatment.[10]

[10] We find merit in the reliance by plaintiff's experts upon: (1) a 1958 article in New England Journal of Medicine on the ototoxicity of neomycin; (2) a 1967 article on the treatment of bone infections by closed irrigation with a non-toxic detergent and various antibiotics, in the Journal of Bone & Joint Surgery; (3) a 1967 text on deafness in childhood; (4) a 1963 article on antibiotic ototoxicity in the British Medical Journal; (5) a 1966 article on hearing loss in a child following use of neomycin, in the Medical Annals of the District of Columbia; (6) various neomycin package inserts prepared by the manufacturers; (7) a 1964 article on neomycin ototoxicity in the Archives of Otolaryngology; (8) a 1965 article on audiotoxicity and neophrotoxicity in the Journal of the American Medical Association; and (9) a textbook entitled Principles and Practice of Antibotic Therapy.

D. *The Applicable Standard of Care*

It is clear under Pennsylvania law that the conduct of a physician is measured by no less than the standard of the average physician in the medical community in which he practices or in similar communities. We have also concluded that as to specialists or those holding themselves out as specialists the standard is a national one, *i.e.*, the standard of the average specialist among the national community specialists. *See* Discussion *infra*. The government contended at trial not only that the applicable standard of care was that followed by surgeons in the Wilkes-Barre area, or a similar (small city) community, but also that this standard was distinctly different from, and inferior to, that followed in Philadelphia, and particularly at teaching institutions in Philadelphia. (While we will refer to the concept of "standard of care," underlying that is the requisite standard of *knowledge* of developments in medical research.) The plaintiff on the other hand argued that any distinction between teaching and non-teaching institutions was artificial and untenable; that there was no difference in the applicable

standard between Wilkes-Barre and Philadelphia; and that in any event, the Wilkes-Barre (or similar locality) standard was breached. While the standard of care question is principally a legal one, it has factual ingredients to which we now turn.

At the threshold, we find that Dr. Wetherbee held himself out as an orthopedic surgeon, a specialist, and was practicing orthopedic surgery on the plaintiff even though he was not Board Certified at the time. Next, based upon the testimony of plaintiff's experts, we find that there is essentially no difference in the standard of orthopedic specialist care between Wilkes-Barre and Philadelphia. We note in this regard, that the two experts in orthopedic surgery produced by the government, while both practicing in small communities (Wilkes-Barre and Quakertown, Pa.), were trained in Philadelphia teaching institutions. We also find that, at least with respect to the issues involved in this case, any difference between the standard of knowledge attributable to teaching hospitals and non-teaching hospitals is so attenuated as to be non-existent. We reach that conclusion for several reasons. First, we are concerned here not with some esoteric aspect of medicine or rare phenomena, but with a garden variety administration of an antibiotic to treat a common disease with which orthopedic specialists are daily concerned. Second, we believe that the wide and free interchange of scientific information through reference works, medical journals, and medical conferences is (and was in 1968) so broad that it tends to homogenize the level of medical knowledge about matters such as the properties and dangers of various antibiotics. Third, we find that there was, in 1968, widespread knowledge of the risks of using neomycin, which knowledge cut across the medical community in its entirety. Finally, we find that Dr. Wetherbee was in breach of the standard of care applicable in Wilkes-Barre (or similar locality) in 1968 as well as of the national standard applicable to orthopedic specialists at that time, because by either standard he should have known that the course of treatment which he followed was improper.

E. *Damages*

The plaintiff, now 48 years of age, was in good health and possessed full normal hearing before his treatment at the Wilkes-Barre VA Hospital.[11] A lifelong resident of Northeastern Pennsylvania, he was then employed by R.C.A. at Dunmore, Pennsylvania as a maintenance machinist, making parts for machines and repairing machine parts. Plaintiff had been a machinist for a number of years, with prior employment at the Tobyhanna Army Depot and Passaic Aircraft. His earnings at RCA in 1967 were $7,881; in 1968 he earned $6,347; and in 1969, the last year he was able to continue working, he earned $8,799. Plaintiff also enjoyed fringe benefits valued at an additional 9%.

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[11] Plaintiff did suffer from the residuals of a low back injury incurred in the U.S. Army in Japan, for which he was receiving a VA disability payment.

The plaintiff's hearing loss and tinnitus (ringing in the ears) grew progressively worse after the accident. It is undisputed that he suffers from severe bilateral sensory nerve deafness, which is irreversible. He has no serviceable hearing, and a hearing aid is of no value to him. Plaintiff's problem is a function of his lack of capacity for discrimination; while he can hear sounds and noises, they are as though the utterers were speaking some unfamiliar tongue. He is also unable to perceive, hence to enjoy music. Fortunately, plaintiff is an excellent lip reader, and can communicate and carry on full and intelligent conversations through that vehicle. Plaintiff's ability to hear some sounds, especially some bass tone vowels, assists his lip reading. Plaintiff continues to suffer from tinnitus which will worsen over the years.

Plaintiff's hearing loss has led to a profound psychiatric problem which has disrupted the fabric of his family and personal life. Prior to the events in question plaintiff was good natured, active in fraternal affairs, and an excellent family man. He has now withdrawn into a shell. He sleeps and eats alone; he shuns all forms of social intercourse and recreational activity, even with his family. He is constantly and extremely irritable, distrustful of everyone around him, and profoundly depressed. He is intermittently threatening, afflicted from time to time with barely controllable rage, and oppressed by a feeling of hopelessness about his life.

Dr. Lord Lee-Benner, a psychiatrist who has examined and treated the plaintiff, testified that the plaintiff suffers from severe depression,[12] resulting from his hearing loss and also from his consequent inability to earn a living. He confirmed the relationship between the symptoms we have just described and the events which give rise to the government's liability, and stated that plaintiff was unable to perform any gainful employment because of his psychiatric condition. While recommending psychotherapy (2 or 3 times per week), Dr. Lee-Benner's prognosis was guarded. We credit this testimony except for the prognosis.

The psychiatrist who examined plaintiff on behalf of the government, Dr. Joseph J. Peters, took a considerably different view. To begin with, Dr. Peters testified that plaintiff possessed a "pre-morbid" personality before the events at issue in this case [13] which would in any event have led to an involutional melancholia in plaintiff's mid-fifties. Dr. Peters opined that this condition predisposed plaintiff to serious sequelae from the hearing loss. While he did not dispute that plaintiff is seriously depressed and unable at present to be gainfully employed,[14] Dr. Peters testified that if the present litigation were resolved favorably to

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[12] Dr. Lee-Benner testified that plaintiff suffered from "psychotic depression."

[13] Dr. Peters defined that term as an obsessive, compulsive personality disorder: *e.g.*, obsessed with having to succeed, but feeling that he is a failure.

[14] Neither physician testified that plaintiff is unemployable because of his hearing loss as opposed to his resulting psychiatric condition.

plaintiff so that he felt vindicated, he could definitely be rehabilitated with psychiatric care. We credit Dr. Peters' testimony and find that plaintiff can be rehabilitated with psychiatric care.

We find that plaintiff has been unable to work since January of 1970 because of his psychiatric condition. His past loss of earnings, including loss of fringe benefits, amounts to $94,000.[15] We believe and find that plaintiff can be rehabilitated and resume gainful employment within one year, if he receives psychiatric care, medication, and some vocational training. Dr. Saul Leshner, a vocational and rehabilitation expert, testified that functionally deaf people can perform a wide range of jobs. He stated that while plaintiff could not work in the vicinity of moving cranes or heavy equipment, he could perform all sorts of bench work. He pointed to the printing industry as a place where functionally deaf people are widely employed. Plaintiff could also do clerical work, packaging, and assembly. Dr. Leshner testified that plaintiff possessed the skills to perform all of these jobs. He added that they would constitute downgrading from his previous employment, which he could not accept without psychiatric help, but that he could perform them with its aid. We credit Dr. Leshner's testimony.[16]

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[15] The parties have stipulated that this is the amount of past loss should we find plaintiff totally disabled to date.

[16] Dr. Leshner expressed his belief that plaintiff, a machinist, could have become a tool and die worker at a considerably higher wage. We are not persuaded and refrain from so finding.

Based upon plaintiff's background and personality we find that plaintiff would have worked until he was past 62 years of age, or another 14 years from date. We find that, because of his disability, he will, after rehabilitation, be gainfully employed but with a reduction in earning capacity of 30%. Over his work life expectancy this will result in a loss of earning capacity, after reduction to present worth at 6% simple interest in accordance with Pennsylvania law, in the sum of $69,250.[17]

Needless to say, plaintiff's pain and suffering is not capable of precise measurement. While his mental suffering should abate with treatment, it has been acute from June 1968 to the present. We reincorporate here our previously stated detailed findings about the destruction of the fabric of plaintiff's personal and family life. And we note again that plaintiff is constantly depressed; he no longer goes to his lodge where he was once extremely active; he eschews fishing, bowling, and other recreational activities which he used to enjoy; he is constantly irritable.

Unlike the psychiatric problems, the tinnitus (constant ringing in the ears) is a disconcerting, indeed

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[17] Included in this award is the full amount of plaintiff's lost earning capacity for one year hence, during which time he will require psychiatric care in order to be rehabilitated. We calculate future loss of earning capacity on the basis of the $14,183 per year the parties have stipulated the plaintiff would now be earning. Pennsylvania law does not recognize an inflationary or productivity factor for future earnings loss. *See Havens* v. *Tonner*, 243 Pa.Super. 371, 365 A.2d 1271 (1976).

tormenting, phenomenon which merits independent consideration as an item of damage. However, even that pales by comparison with the deafness which will never abate. No purpose would be served by discoursing with emotion about the spectre of deafness, for any human being can grasp, at least in some measure, its travail. Having seen the plaintiff labor under his disability and having heard testimony of its impact on him is sufficient for us to grasp the magnitude of his tragedy. Plaintiff was a normal human being living a full life; today he is but a shell of his former self. We find that a fair and reasonable sum to compensate the plaintiff for past pain and suffering is $75,000 and that a fair and reasonable sum to compensate plaintiff for his future pain and suffering over his life expectancy [18] is $75,000. Additionally, we find plaintiff has incurred past medical expense in the sum of $286 to Dr. Sataloff and $2,000 to Dr. Lee-Benner.[19] Finally, we find that he will require the sum of $5,000 for psychiatric treatment in the future in order to effect rehabilitation so that he can resume gainful employment and a more normal family and personal life.

We turn now to the applicable principles of law.

[18] Plaintiff's life expectancy is 25 years.

[19] We also find these sums to be fair and reasonable.

III. *Discussion*

A. *The Statute of Limitations*

As we have noted in the Preliminary Statement, the Act's statute of limitations bars claims against the United States except where they are presented in writing within two years after the claim accrues. The determination of when a claim accrues is a matter of federal, not state law. *Tyminski* v. *United States*, 481 F.2d 257, 262 (3d Cir. 1973). The test which has been articulated, with considerable uniformity, to determine "when a claim accrues" is to ascertain the point in time at which the claimant has discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice. *Bridgford* v. *United States*, 550 F.2d 978, 981 (4th Cir. 1977); *Ciccarone* v. *United States*, 486 F.2d 253, 256 (3d Cir. 1973); *Tyminski* v. *United States*, *supra*, at 263; *Toal* v. *United States*, 438 F.2d 222, 224-25 (2d Cir. 1971); *Ashley* v. *United States*, 413 F.2d 490, 492 (9th Cir. 1969); *Coyne* v. *United States*, 411 F.2d 987, 988 (5th Cir. 1969); *Brown* v. *United States*, 353 F.2d 578, 579 (9th Cir. 1965); *Beech* v. *United States*, 345 F.2d 872, 874 (5th Cir. 1965); *Kossick* v. *United States*, 330 F.2d 933, 935 (2d Cir.), *cert. denied*, 379 U.S. 837, 85 S.Ct. 73, 13 L.Ed.2d 44 (1964); *Hungerford* v. *United States*, 307 F.2d 99, 102 (9th Cir. 1962); *Quinton* v. *United States*, 304 F.2d 234, 240 (5th Cir. 1962).

The *Quinton* court, which originated this rule, derived it from the "blameless ignorance" notion articulated in *Urie* v. *Thompson*, 337 U.S. 163, 170, 69

S.Ct. 1018, 1025, 93 L.Ed. 1282 (1949). Judge Tuttle described the *Quinton* rule as a "sensible and just" alternative to the then majority state court rule that a cause of action for malpractice accrues on the date of the negligent act, even if the injured patient is unaware of his plight.

The *Quinton* rule has received widespread acceptance; however, the parties here disagree about what it means. The government reads the rule to mean that the statute begins to run, without more, when the plaintiff becomes aware that he has been injured as the result of a physician's treatment. The plaintiff, however, contends that the physician's conduct cannot be described as "acts constituting malpractice" until the patient, concededly being required to apply reasonable diligence, has some reason to believe that the acts which caused him injury may have been negligent. The government rejoins that the plaintiff has semantically toyed with the rule, converting it into one under which the statute does not begin to run until he discovers that the acts constitute malpractice.

The foregoing dialogue suggests to us that the syntax of the *Quinton* rule is less than crystal clear and that the rule cannot be given a definite literal meaning. The problems with literal interpretation are, *inter alia*, demonstrated by the case where the conclusion that acts of a physician which produced pain or injury are negligent requires a sophisticated, medically informed judgment. In reading *Quinton* as requiring only a confluence of act, injury, and cause

which were known, or should reasonably have been known to plaintiff, the government thus appears to suggest that *Quinton* posits a strong if not irrebutable presumption that knowledge of the causal relationship between treatment and injury is sufficient to alert a reasonable man that there may have been negligence in his treatment and that he should therefore bring suit. The plaintiff disagrees. In his view, where the patient has exercised reasonable diligence in ascertaining the cause of his injury and where the investigation, while demonstrating the relationship between his treatment and injury, reveals no negligence, the statute does not begin to run, just as in the case where a patient was aware that a negligent act was performed but unaware that the act caused him harm.[20]

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[20] Such a case, and one inveighing against the government's simplistic reading of *Quinton*, is *Portis* v. *United States*, 483 F.2d 670 (4th Cir. 1973), remarkably similar in some aspects to the case at bar. In *Portis*, the parents of the minor plaintiff learned in October 1963 that an Air Force nurse had erroneously administered neomycin hypodermically rather than orally as instructed. They did not learn, however, until 1969, that this earlier negligence on the part of the government employee had caused their daughter's loss of hearing. Rather than holding that the statute of limitations began to run in 1963 when they learned of the acts constituting the alleged negligence—as a literal application of the accrual rule would seem to require—the Court held that the "cause of action for malpractice resulting in deafness did not accrue until 1969." 483 F.2d at 673. The basis of the decision was that until 1969 the plaintiff and her parents were blamelessly ignorant of the fact that the improper administration of neomycin was the proximate cause of plaintiff's deafness and that it therefore would have been unreasonable to require them to bring suit earlier.

We believe that the government's reading of *Quinton* is simplistic and conceptually inaccurate, particularly given the "blameless ignorance" roots of the *Quinton* rule. It would certainly appear to make little sense to limit the application of the *Quinton* rule to only certain kinds of blameless ignorance. In *Urie*, *supra*, the Supreme Court did not believe that the plaintiff, asserting a FELA claim, should be bound to a running statute of limitations period until his disease (silicosis), the subject of his claim, became evident. The court reasoned that "blameless igorance" should not result in a deprivation of rights, explaining that "the traditional purposes of the statutes of limitations . . . conventionally require the assertion of claims within a specified period of time after the *notice of invasion of legal rights*." 337 U.S. at 170, 69 S.Ct. at 1025 (emphasis added). Until negligence reasonably appears, a plaintiff has no notice that his rights have been invaded. As a practical matter it would be unreasonable to require, or even suggest for protective purposes, that one who is unaware after reasonable investigation that a physician's conduct breached a legal duty to him must file suit alleging that some duty was breached. Thus where negligence is such as to escape the notice of one who reasonably investigates, we believe *Urie* teaches that the limitations period should not yet begin to run. *See also* n. 20, *supra*.

We agree with plaintiff, that where the patient perceives the relationship between treatment and injury but, notwithstanding diligence, has no reason to

believe that there was any negligence in the treatment, the statute does not being to run. Put differently, we read the *Quinton* test, adopted by the Third Circuit in *Tyminski*, as creating a *rebuttable* presumption that knowledge of the causal relationship between treatment and injury is sufficient to alert a reasonable person that there may have been negligence related to treatment. Before finalizing this analysis we must examine the cases relied on by the government, to support its interpretation of *Quinton*, and other important cases in this area.

In *Tyminski* v. *United States*, *supra*, the veteran was admitted to a VA hospital because of difficulty in walking and increasing pain in his right side. A diagnosis was made that there was a (congenital) space-taking lesion of the thoracic area of the spinal cord known as an arteriovenus angioma (AVA). After exploratory surgery, Tyminski became paraplegic. The Court of Appeals recounted the pertinent facts as follows:

> Tyminski was persistently informed by the [VA] physicians that the paraplegia was due to the natural progression of the congenital AVA. The District Court, however, found that the paraplegia was caused by post-operative bleeding within the operative site which collected in the space outside the dura, forming an epidual hematoma and causing pressure on the spinal cord. The pressure of the hematoma created a block of the spinal cord. An epidural hematoma in these circumstances, the District Court found, requires immediate treatment consisting of a

> second operation for the purpose of removing the accumulated blood and stopping the source of the bleeding. The failure to re-operate and stop the post-operative bleeding was found to be the proximate cause of the paraplegia. The defendant's negligence consisted in failing to recognize the symptoms of paralysis as caused by the hematoma and in failing to re-operate and stop the post-operative bleeding. [481 F.2d at 260]

After his discharge from the hospital, Tyminski sought assiduously to establish a "service-connected disablity that aggravated [his] condition and sent [him] to the hospital for treatment." *Id.* His efforts found his way to the VA. (Like Kubrick he was aided by various service organization representatives, and also some Congressmen.) However, the VA denied relief, refusing to increase his disability rating and assuring him (much as they did Kubrick) that the condition was no fault of the VA. Various appeals, in one of which "an error in medical judgment" was averred, also came to naught; the VA continued to tell Tyminski that it had committed no malpractice in that his paraplegia resulted from natural progression of the AVA. Suit was not brought until 10 years after the initial AVA surgery.

Adopting the *Quinton* formulation, the Third Circuit upheld the finding of the District Judge that Tyminski's action (brought two years prior to his death) was not time-barred against the government's contentions that by no later than June 9, 1964, two and one-half years before the action was filed, Tyminski believed that there was or may have been

negligence arising from his surgery in the VA hospital. In dealing with the government's contention, the Court of Appeals first addressed the initial question whether Tyminski knew more than two years before suit was brought that there had been post-operative bleeding in the operative site resulting in the formation of hematoma with the awareness that the hematoma caused the paralysis. The Court stated:

> Only the knowledge that these acts occurred would preclude Tyminski from asserting that he did not discover the acts constituting the alleged malpractice. In each of the medical malpractice cases which have applied the federal rule of accrual of claims the inquiry by the court has been focused on the specific acts upon which the claim for malpractice was based. *See e.g., Toal* v. *United States, supra* (known retention of pantopaque, an iodized radiopaque contrast medium used in myelograms, in the plaintiff's lumbar sac); *Ashley* v. *United States, supra* (use of a needle to draw blood from plaintiff's arm resulting in nerve damage); *Brown* v. *United States, supra,* (use of excessive oxygen known to have caused infant's blindness). The record amply supports the conclusion that Tyminski did not discover the acts constituting the malpractice more than two years before the action was brought. [481 F.2d 263-64].

Turning then to the remaining focus of its inquiry, *i.e.*, whether Tyminski should in the exercise of reasonable diligence have discovered the "acts" constituting malpractice, the Court of Appeals concluded that Tyminski had exercised reasonable diligence be-

cause of his persistence in attempting to ascertain some medical basis for increasing his disability payments. The Court also concluded that his failure to discover earlier the acts constituting malpractice was not unreasonable because of: (1) the government's failure to inform him that injury might result from the operation; (2) his reasonable belief that the injuries resulted from the natural progression of the pre-existing congenital spine tumor; and (3) the persuasiveness of the medical opinions of the VA physicians that the natural progression of the AVA caused his problems. In this regard, the Court also stated:

> The unanimous determination by the persons reviewing Tyminski's claim that the injuries were due to the AVA is telling evidence supporting the conclusion that Tyminski in the exercise of reasonable diligence should not have discovered the existence of the acts of malpractice upon which his claim in the District Court was based. [*Id.* at 265]

Tyminski's claims were thus held not to be time barred.

Notwithstanding the government's reliance on *Tyminski*, that case is helpful to the plaintiff in many respects, especially in terms of the following factors: (1) plaintiff's diligence in pursuing the medical cause of his deafness and in seeking vindication before the VA; and (2) the persuasiveness of the VA doctors frequent reaffirmations to him that there was no medical error committed by the VA. The Third Circuit did not find *Tyminski's* persistence pursuing his claim before the VA or even his scattershot allegations of negligence sufficient to bar his claim and neither do we with respect to Kubrick. However, we must return to our conceptual analysis.

We find that *Tyminski* demonstrates the difficulties of defining the notion of "acts constituting malpractice." The Court's opinion relates that notion to the post-operative bleeding of which plaintiff was unaware. But was that bleeding an "act of malpractice" distinguishable from the negligence of the doctors in failing to recognize that the symptoms of paraylsis were caused by the hematoma and in failing to reoperate and stop the bleeding? In such a case it may be that a plaintiff cannot discover the act which was the cause of his injury without also discovering (or suspecting) negligence. Thus *Tyminski* itself calls into question whether the concept of "acts constituting malpractice" can be meaningful apart from a unitary test whereby the extent to which a plaintiff must at least have reason to suspect that negligence occurred is a factor. Indeed, more often than not, there is no "act" constituting malpractice, but rather a *failure* to act which, in turn, is a function of misjudgment about sophisticated and technical medical matters. Such things are inherently difficult for a claimant to perceive in the abstract or without some revelation of negligence.[21]

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[21] Reasonably believing that deafness resulted as an unavoidable byproduct of necessary treatment for osteomyelitis is not really very different from reasonably believing, as the

Other circuits which have faced factual situations akin to those at bar have injected into the equation the ingredient of plaintiff's realization that there "may have been negligence." In *Brown* v. *United States*, *supra*, the Ninth Circuit said that the statute began to run when the plaintiff was "informed as to the exact nature of the disability and its relationship to prior medical treatment," which the court found to represent "*knowledge of facts sufficient to alert a reasonable person that there may have been negligence* . . . ." 353 F.2d at 580 (emphasis added). And in *Reilly* v. *United States*, 513 F.2d 147 (8th Cir. 1975), the Court ruled that the plaintiff had knowledge sufficient to alert a reasonable person that there may have been negligence related to the treatment . . .," invoking the duty diligently to file a claim. *Id.* at 150.

Brown and *Reilly* reinforce our view of the following: that while the premise of *Quinton* is that knowledge of the causal relationship between treatment and injury is generally sufficient to alert a reasonable person that there may have been negligence related to the treatment, this presumption of sufficiency cannot be deemed to be an irrebuttable one; that the exception often proves the rule; and that *Quinton* must be applied on an ad hoc basis in each case.

plaintiff in *Tyminski* did, that paraplegia resulted from the natural progression of AVA. In neither case can the plaintiff be expected to file a malpractice claim given the limited state of his knowledge. *Ciccarone*, *supra*, also in the Third Circuit, is not helpful to the government because it emanates from a simple factual context with a direct relationship between a blue dye injection and the deterioration of plaintiff's health and because the Court found that plaintiff was sophisticated in such matters and had consulted competent counsel within the two-year period.

An important illustration of our point may be found in *Jordan* v. *United States*, 503 F.2d 620 (6th Cir. 1974). Jordan, a one-eyed World War II veteran, entered a Veterans Administration Hospital in November of 1968 to alleviate surgically a chronic sinus condition. *Immediately after the operation* his upper face became swollen to a point where he could not see out of his good eye, the right one. Four or five days later the swelling subsided and Jordan noted that discolored areas appeared below both his good right eye and his artificial left eye. Jordan was also then aware that the pupil of his right eye wandered to the right impairing his vision. Jordan queried a VA physician while hospitalized about his sight, and was told such was the result of muscle damage *caused by the operative procedures* involved in dealing with his sinus condition. Shortly thereafter, upon being discharged from the hospital, Jordan was told to return early in 1969 for corrective eye surgery. Jordan was operated on unsuccessfully in January and February of 1969. In the subsequent months Jordan's eyesight grew progressively worse, forcing him to retire from his job with the Post Office in February, 1970. Jordan continued to return to the VA hospital for treatment of his sinus condition and eye examinations. Finally, on June 7, 1971, during one of his eye examinations, the examining doctor in-

formed him that such visits were no longer necessary as there was nothing they could do for the eye, and that it was "*too bad they screwed up your eye when they operated on your nose.*" *Id.* at 621 (emphasis added). Jordan retained a lawyer who filed a claim on his behalf with the VA on June 1, 1972.

The government, as in this case, filed a Motion to Dismiss or in the alternative for Summary Judgment on the grounds that plaintiff knew that treatment he received while in a VA hospital four years prior resulted in his injury and therefore the statute of limitations had expired. That motion was granted by the District Court.

The Court of Appeals, in reinstating Jordan's Complaint, specifically rejected government's argument that knowledge that the treatment rendered caused the injury (*i.e.*, knowledge of causation without more) triggered the limitation period. Although the evidence contained in the record proved that Jordan knew in November 1968 that his loss of sight was a result of muscle damage sustained in the sinus operation, he was unaware that the result was because of improper performance until June 7, 1971. The Court held that the statute of limitations had not expired because plaintiff was blamelessly ignorant of the act of malpractice prior to June 7, 1971:

> It [the evidence] failed to show that this appellant, in the exercise of reasonable diligence, should have been aware that the muscle damage may have been the result of the *improper performance* of his sinus operation. Contrary to the characterization of the district court and the

> government, neither the unsuccessful eye operations nor the other events established by the record signified that anything had been done incorrectly in November, 1968. They indicated only that appellant's injury was causing his loss of vision and was apparently permanent, but not that it was the result of malpractice. Moreover, these developments were not inconsistent with appellant's belief that the loss of his vision was the inevitable consequence of the proper procedures used by the doctors to treat his "severe" sinus condition during the November, 1968 operation. Thus they provided no clue that his belief, though based on a VA doctor's response to his questions, might be incorrect. [*Id.* at 624 (emphasis added).]

Jordan is quite similar to the case at bar.

As with the blindness that beset Jordan, the unusual and unexpected occurrence of deafness required Kubrick to seek medical treatment and a diagnosis of its cause. In both cases, the explanations received consistently indicated an injury possibly compensable by an increased disability rating, though an injury that had occurred through no fault on the part of the Veterans Administration. Kubrick filed his claim trying to receive compensation he thought to be his due. As was the fate of Jordan, Kubrick was misled into believing that his loss was not caused by any fault of the Veterans Administration. The actions of Kubrick were not dissimilar to the actions of any unknowing layman unaware that an act of malpractice has been perpetrated upon him. Even more

diligent than Jordan, Kubrick consulted with private physicians to ascertain the facts concerning his situation, but blamelessly remained ignorant of the act of malpractice until June 2, 1971, when Dr. Soma informed him that neomycin should not have been administered to him. The diligence factor is a most important one. Indeed, we believe that *Brown* and *Ashley* can be distinguished because the claimants there failed to investigate unusual or unexpected occurrences.

In legal terms we have concluded that the *Quinton* test creates a rebuttable presumption that knowledge of the causal relationship between treatment and injury is sufficient to alert a reasonable person that there may have been negligence related to treatment. We believe this formulation to be responsive to the Third Circuit's thinking as reflected in its recent cases. This conclusion does not transform *Quinton* into a purely subjective standard dependent on a plaintiff's state of mind; such a construction would promote stale claims against which it would be increasingly difficult to defend.[22] To the contrary, it construes *Quinton* as positing an objective or reasonable man standard in which the success of a plaintiff in tolling the statute depends not only upon his exercising reasonable diligence, but also upon his establishing that there was no reasonable suspicion that there was negligence in his treatment. For, as we have said above, we do not believe it reasonable

[22] Indeed, in this case, Dr. Wetherbee, the attending surgeon, has died.

to start the statute running until the plaintiff had reason at least to suspect that a legal duty to him had been breached.

Turning to factual considerations, we have found: (1) that plaintiff exercised all kinds of reasonable diligence in attempting to establish a medical basis for increased disability benefits; (2) that the results of his inquiry contraindicated negligence; and (3) that because of the technical and obscure nature of the medical problem (involving the propensity of the body to absorb a toxic antibiotic under a given mode of administration) the plaintiff could not be expected to draw any meaningful inferences that there had been negligence in his treatment, or even to suspect it. Under these circumstances, we conclude that the plaintiff has rebutted the *Quinton* presumption, and cannot be deemed to have known of the "acts constituting malpractice" until his visit to Dr. Soma in June 1971. Since plaintiff's claim thus accrued in June 1971, and since the plaintiff's administrative claim was filed in January 1973, this suit (filed in September 1972) is not barred by the statute of limitations.[23] We turn now to the substantive malpractice issues.

[23] The government has cited to us *Rosario* v. *United States*, 531 F.2d 1227 (3d Cir. 1976), in support of its argument that we lack subject-matter jurisdiction over plaintiff's action because he failed to comply with 28 U.S.C. § 2675(a) requiring him to file an administrative claim prior to instituting suit. As indicated in our findings of fact (*supra*), plaintiff's complaint was filed on September 14, 1972, and his form 95 administrative claim was filed on January 13, 1973 and re-

B. *The Malpractice Issues*

1. *The Applicable Standard of Law*

The substantive malpractice issues before us are, of course, governed by the Pennsylvania law. 28 U.S.C. § 1346(b); *Ciccarone* v. *United States, supra.* We must therefore examine the Pennsylvania standard of care.

Dr. Wetherbee held himself out as a specialist. We believe that Pennsylvania law provides that a specialist owes to his patient a higher standard of skill, learning and care than a general practitioner. The specialist:

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jected on April 13, 1973. Obviously, the administrative filing did not precede institution of this suit, but that filing did occur within two years of the accrual of plaintiff's claim so that the "appropriate Federal agency [did receive a claim presented in writing] within two years after such claim accrue[d]." 28 U.S.C. § 2401. The government's sole objection, therefore, is to the fact that this suit was filed before the final disposition of the administrative proceeding.

Rosario certainly confirms that a § 2675(a) filing is a jurisdictional prerequisite to an action against the United States under the Federal Torts Claim Act, but that case involved a failure to file any administrative claim and does not support the government's argument in the present case. It is our view that where the action is pursued to conclusion in federal court, even though its filing preceded a timely administrative claim, and where the administrative claim is disposed of prior to trial and decision in the federal suit, that suit is ratified, as it were, and the jurisdictional prerequisites are met, thus mooting the government's arguments of lack of subject-matter jurisdiction. To hold otherwise would be to elevate form over substance and erroneously presume a legislative intent to bar a plaintiff's claim purely because he did not go through the technical procedure of refiling a complaint which was already before the Court.

> is expected to exercise that degree of skill, learning, and care normally possessed and exercised by the average physician who devotes special study and attention to the diagnosis and treatment of [particular] diseases. Due regard must of course be shown to the advanced state of the profession at the time of the diagnosis or treatment. [footnote omitted.]

McPhee v. *Reichel*, 461 F.2d 947, 951 (3d Cir. 1972). The *McPhee* formulation represents the Third Circuit's prediction as to Pennsylvania law in the absence of a clear Pennsylvania Supreme or Superior Court holding on the subject. The *McPhee* Court commented, however:

> This charge conforms with the Pennsylvania practice of alerting the jury to the fact that a defendant who is a specialist should be held to a higher degree of care than a general practitioner. The case law and scholarly comment also support this instruction. Laub's Pennsylvania Trial Guide, Physicians and Surgeons, Chapter 2, § 21, Pp. 258-9. [Footnote omitted.]

McPhee does not specifically refer to the trichotomy in the malpractice case law—those cases which require physicians to adhere to the standard of skill and learning and care practiced by the average physician in the same (and only the same) locality; the cases which expand the reference to encompass the same locality and any similar locality; and the line of cases which measures the physician conduct against a "national standard." Neither has the Pennsylvania

Supreme Court formally addressed the question,[24] although it has for a number of years followed the similar locality rule with respect to general practitioners.[25] Whatever may be said for the reasonableness of similar locality rules circa 1977,[26] they cannot reasonably

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[24] *Incollingo* v. *Ewing*, 444 Pa. 263, 282 A.2d 206, 214 n.5a (1971), expressly left open the question whether Pennsylvania would continue to abide by the similar locality rule.

[25] *See, e.g., Smith* v. *Yohe*, 412 Pa. 94, 194 A.2d 167, 170 (1963); *Donaldson* v. *Maffucci*, 397 Pa. 548, 156 A.2d 835 (1959). In these cases the Court in enunciating the similar locality rule articluated it as applicable to "a physician *who is not a specialist* . . . ." (Emphasis added.)

[26] In *Shilkret* v. *Annapolis Emergency Hospital Ass'n.*, 276 Md. 187, 349 A.2d 245 (1975), the Court of Appeals of Maryland traced the origins of the strict locality rule, noting the grounds on which it has been attacked. The Court also traced the history of the similar locality rule and the national standard, surveying the jurisdictions following the various rules. The Maryland Court's treatment is impressive. We agree with the Maryland Court that the justification underlying the development of the locality and similar locality rules have been eroded by collateral developments in medical education and broad societal change. As the Court noted:

> Whatever may have justified the strict locality rule fifty or a hundred years ago, it cannot be reconciled with the realities of medical practice today. "New techniques and discoveries are available to all doctors within a short period of time through medical journals, closed circuit television presentations, special radio networks for doctors, tape recorded digests of medical literature, and current correspondence courses." Note, *An Evaluation of Changes In The Medical Standard of Care*, 23 Vand.L.Rev. 729, 732 (1970). More importantly, the quality of medical school training itself has improved dramatically in the last century. Where early medical education consisted of a course of lectures over a period of six months, which was supplemented by apprenticeships with doctors who had even less formal education,

> there now exists a national accrediting system which has contributed to the standardization of medical schools throughout the country. *Id.* n.16 [Footnote omitted.]
>
> We agree with these courts [*see* citations which follow] that justification for the locality rules no longer exists. The modern physician bears little resemblance to his predecessors. As we have indicated at length, the medical schools of yesterday could not possibly compare with the accredited institutions of today, many of which are associated with teaching hospitals. But the contrast merely begins at that point in the medical career: vastly superior postgraduate training, the dynamic impact of modern communications and transportation, the proliferation of medical literature, frequent seminars and conferences on a variety of professional subjects, and the growing availability of modern clinical facilities are but some of the developments in the medical profession which combine to produce contemporary standards that are not only much higher than they were just a few short years ago, but also are national in scope.

349 A.2d at 249, 252 (footnote omitted).

Several cases supporting the national standard of care for specialists, most of which are referred to in *Shilkret*, are as follows: *Karp* v. *Cooley*, 493 F.2d 408, 423 (5th Cir. 1973), *cert. denied*, 419 U.S. 845, 95 S.Ct. 79, 42 L.Ed.2d 73 (1974) (Texas law); *Ayers* v. *Parry*, 192 F.2d 181, 184 (3d Cir. 1951), *cert. denied*, 343 U.S. 980, 72 S.Ct. 1081, 96 L.Ed. 1371 (1952) (New Jersey law); *Bruni* v. *Tatsumi*, 46 Ohio 2d 127, 346 N.E.2d 673, 676 (1976); *Kronke* v. *Danielson*, 108 Ariz. 400, 499 P.2d 156, 159 (1972); *Christy* v. *Saliterman*, 288 Minn. 144, 179 N.W.2d 288, 302 (1970); *Naccarato* v. *Grub*, 384 Mich. 248, 180 N.W.2d 788, 790-91 (1970) (grounded principally upon reliance and expectations of the public); *Brune* v. *Belinkoff*, 354 Mass. 102, 235 N.E.2d 793, 798 (1968). There are, however, cases of recent vintage which adhere to the similar community standard: *e.g., Kortus* v. *Jensen*, 195 Neb. 261, 237 N.W.2d 845, 850 (1976); *Little* v. *Cross*, 217 Va. 71, 225 S.E.2d 387, 390 (1976); *Coleman* v. *Garrison*, 349 A.2d 8 (Del. 1975) (where it appears that defendant was a gynecological surgeon although his status as a specialist is not discussed).

be said to apply to those practitioners of the healing art to whom the general practitioner refers patients with ailments which are unusually complex or intractable or which pose a threat to well-being or life itself.

The language of the Maryland Supreme Court in *Shilkret* v. *Annapolis Emergency Hospital Association*, note 26 *supra*, is apposite here:

> Were we to adopt a standard tied to locality for specialists, we would clearly be ignoring the realities of medical life. As we have indicated, the various specialties have established uniform requirements for certification. The national boards dictate the length of residency training, subjects to be covered, and the examinations given to the candidates for certification. Since the medical profession itself recognizes national standards for specialists that are not determined by geography, the law should follow suit [*Id.* 349 A.2d at 251].

We cannot conceive that the highest Court of Pennsylvania, a state containing numerous medical schools, including some of the nation's most prestigious, would fail to adopt the national standard for specialists.

Our observation as to the direction of the law is consistent with *McPhee*, which by our reading articulates a complete description of the standard of care required of a specialist, yet does not include a "similar locality" restriction. It is also consistent with our independent reading of the Pennsylvania malpractice cases involving general practitioners, which in applying a similar locality standard seem to highlight that

the standard applies to general practitioners only.[27] In short, we predict that the Pennsylvania Supreme Court will apply a national standard to specialists.[28]

There is another principle in the Pennsylvania law of medical malpractice which must be noted because the government relies upon it in this case: that a physician is not liable for a mere error of judgment. *Smith* v. *Yohe*, 412 Pa. 94, 194 A.2d 167, 170 (1963). This rule is obviously a function of the fact that there are so many elemnts which enter into a determination of treatment, including the factor of judgment, that faulty treatment will not constitute malpractice if the physician has exercised the skill and knowledge required by the standard to which he is subject and if his judgment takes into account all of the various factors available to him. If, however, he breaches the standard of care (or if the error of judgment is so gross as to be inconsistent with the degree of skill and knowledge which it is the duty of a physician to possess), then, as in this case, the error of judgment doctrine is of no avail.

We turn now to the application of the law to the facts.

2. *Did the Treating Physician Meet the Standard?*

As we noted at the outset, the alleged medical malpractice in this case stems principally from Dr. Weth-

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[27] Note 25 *supra*.

[28] While not a basis for our decision in holding specialists to a national standard of care, we raise the question whether VA Hospitals, which are part of a national system, are not perforce bound to a national standard by their very nature.

erbee's lack, not of skill in diagnosis or treatment as such, but of knowledge of the properties of neomycin. In order to determine whether Dr. Wetherbee's treatment met the Pennsylvania standard of what specialists should know, we incorporate here our findings of fact on the extent of knowledge in the medical community as to the capacity of neomycin to be absorbed into the body tissues and bloodstream from a post-surgical wound irrigating solution. Those findings tell us that Dr. Wetherbee's lack of knowledge, and his concomitant treatment, violated the national standard for specialists because of the generalized knowledge in the national community of orthopedic specialists of the hazards of neomycin and of its potentiality for absorption in circumstances such as those created by Dr. Wetherbee's use of neomycin in 1% irrigating solution through a closed hemovac system (at least in such high and lengthy dosage). However, even if a similar locality standard were to be applied, our findings of fact support the conclusion that the information in question was available to or known by the average specialist in Wilkes-Barre to the same or similar extent as the average specialist in Philadelphia. Wilkes-Barre, after all, is hardly a remote outpost of civilization. It is the commercial and industrial hub of the populous Wyoming Valley, adjacent to the Scranton metropolitan area from which the plaintiff hails.[29] And the Scranton Wilkes-Barre area

[29] The combined population of Luzerne and Lackawanna Counties of which Wilkes-Barre and Scranton respectively are the County seats is over 576,000.

is only two hours by automobile from either Philadelphia or New York. Specialists in Wilkes-Barre receive the same medical journals as those in Philadelphia and New York, attend the same specialist conventions, etc.

In sum, our findings from the evidence compel the legal conclusion that Dr. Wetherbee violated the standard of care imposed upon him by law because he administered excessive quantities of neomycin to the plaintiff over an extended period of time through an imperfectly functioning hemovac tube system, and also because he failed to utilize polycillin (ampicillin) or penicillin, the true drugs of choice in the situation, given the ototoxic hazards of neomycin. While on a national standard the plaintiff would have succeeded by a very substantial margin, because of these conclusions, under the similar locality test, plaintiff has at least established his case by a fair preponderance of the evidence.[30] Finally, we conclude that what was involved was not mere error in judgment but a lack of skill or knowledge as measured, of course, by the level of medical knowledge in April, 1968.

[30] We note that the doctor's failure to use the (correct) drug of choice does not appear to implicate any difference between a national and similar locality standard. Neither would his permitting a poorly functioning hemovac tube system to continue in operation. And if the nurses were responsible for permitting the hemovac tube system to fail that would not help the government which is responsible for their conduct.

IV. *Conclusion*

We have found that plaintiff's administrative form 95 claim was timely filed and have concluded that this suit, although begun prior to his administrative claim, was not vitiated where the complaint was still on the docket after the rejection of the administrative claim. We have found that Dr. Wetherbee breached the standard of care with which he is charged by Pennsylvania law and that as the proximate result of his negligence, the plaintiff suffered a severe bilateral sensorineural hearing loss as well as serious emotional problems. And we have found that plaintiff is entitled to recover damage for his past lost earnings, loss of future earning capacity, past and future pain and suffering, and past and future medical expense in the total sum of $320,536.00. Accordingly, we enter the following Order.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2388

WILLIAM A. KUBRICK

vs.

UNITED STATES OF AMERICA, APPELLANT

(D.C. Civil Action No. 72-1815)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, WEIS and GARTH *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 7, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed July 25, 1977, be, and the same is hereby remanded for the limited purpose of reducing the amount of the judgment by the amounts paid to the date the set-off is applied, and affirmed in all other respects. Costs taxed against appellant.

ATTEST:

/s/ Frances R. Matysik
Acting Clerk

July 27, 1978

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-1815

WILLIAM A. KUBRICK

v.

UNITED STATES OF AMERICA

ORDER

AND NOW, this 22nd day of July, 1977, in consideration of the foregoing Opinion, containing findings of fact and conclusions of law, it is ORDERED that judgment be entered in favor of the plaintiff and against the government in the sum of $320,536.00.

BY THE COURT:

/s/ Edward R. Becker
EDWARD R. BECKER, J.

APPENDIX E

Apr. 13, 1973

021
C 17 381 329
KUBRICK, William A.

CERTIFIED MAIL

Mr. Michael I. Luber
Attorney at Law
1420 Walnut Street
11th Floor
Philadelphia, Pennsylvania 19102

Re: Administrative Tort Claim—
William A. Kubrick

Dear Mr. Luber:

This is in reference to the above-captioned administrative tort claim filed with this agency.

A review of the facts and circumstances connected with this case reveals that the claim of Mr. Kubrick was not filed within the two-year statute of limitations provided by Section 2401(b) of the Federal Tort Claims Act, 1346(b), 2671, et seq. Accordingly, this agency is without jurisdiction to consider the claim.

Section 2401(b) provides that a tort claim administratively denied may be presented to a federal district court for judicial consideration. Such suit may

be initiated within six months after the date of mailing of the notice of denial. For purposes of this provision, this letter will constitute a denial of this claim.

Sincerely yours,

JOHN H. KERBY
Assistant General Counsel

cc: Chief Attorney
VAC, Philadelphia, PA

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 279068 219

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1014

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

WILLIAM A. KUBRICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~NINTH~~ Third CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 21, 1978
CERTIORARI GRANTED FEBRUARY 21, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1014

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

WILLIAM A. KUBRICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~NINTH~~ Third CIRCUIT

INDEX

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1972	
Sept. 14	Complaint filed
Sept. 14	Summons Exit
Sept. 26	Summons returned 9/15/72 served U.S. Attorney, Phila. on 9/18/72 served Attorney General of the U.S., Washington, D.C., by certified mail, filed
Sept. 26	Govt's interrogatories to pltff, filed
Sept. 13	Govt's Motion to Dismiss Complaint or in the alternative for Summary Judgment and Notice thereof, filed
Sept. 13	Govt's Affidavit in support of Motion to Dismiss or in the Alternative for Summary Judgment, filed
Sept. 13	Memorandum in Support of Motion of the United States to Dismiss Complaint or in the Alternative for Summary Judgment, filed
Dec. 4	Plff's Memorandum Contra to deft's Motion to Dismiss Complaint or in the Alternative for Summary Judgment, filed
1973	
Mar. 1	Plff's Answers to deft's interrogatories, filed
Mar. 5	Addendum to plff's Memorandum contra Motion of the United States to Dismiss Complaint or in the alternative for Summary Judgment, filed
July 26	Deposition of William A. Kubrick, filed
Oct. 3	Govt's supplemental interrogatories, filed
Nov. 6	Plff's answers to deft's supplemental interrogatories, filed

DATE	PROCEEDINGS

1973

Nov. 6 Plff's interrogatories to deft, filed

Dec. 27 Deft's Supplemental Memorandum in support of its Motion to Dismiss, filed

1974

Jan. 30 Plff's reply brief to deft's supplemental Brief in support of the Motion to Dismiss, filed

Mar. 21 Order DENYING deft's Motion to Dismiss and for summary judgment, filed 3/22/74 entered and copies mailed EB

Apr. 5 Pre-Trial Order Becker, J., filed 4/8/74 entered and copies mailed EB/C1

Apr. 23 Plff's Motion to compel answers to interrogatories, Memorandum in support thereof, filed

Apr. 26 Order that deft make full and complete answers to plff's Interrogatories Numbers 1 through 49 inclusive by 5/29/74, filed 4/29/74 entered and copies mailed EB

May 28 ANSWER, filed

May 28 CASE LISTED FOR TRIAL

May 28 Deft's answer to Plff's interrogatories, filed

Nov. 20 Plff's pretrial memorandum, filed.

Dec. 3 Def's. pretrial memorandum, filed.

1975

Jan. 10 Deposition of Dr. James Cole, filed.

Feb. 26 Plff's first request for the production of documents and tangible things under Rule 34, filed.

Mar. 4 Def's. response to plff's. motion for sanctions, filed.

Mar. 18 Plff's. notices to depositions of Drs. Irons and Sternlieb, filed.

DATE	PROCEEDINGS

1975

Mar. 18 Plff's. supplemental pretrial memorandum, filed.

Mar. 27 Def's. supplemental answers to plff's. interrogatories, second set, filed.

Mar. 27 Def's. supplemental pretrial memorandum, filed.

May 27 Def's. trial brief, filed.

May 29 Plff's. trial brief, filed.

July 8 Appearance of Leonard M. Sagot as co-counsel for plff., filed.

Aug. 22 Transcript of chambers conference, 8/13/75, filed. (Naythons, J.

Oct. 6 Motion of Leonard M. Sagot to withdraw as plff's. counsel, filed.

1976

Apr. 28 Withdrawal of appearance of Paul R. Anapol, Esq. for the plff and entry of appearance of Klovsky, Kuby & Harris for the plff., filed

Apr. 28 Plff's supplemental memorandum contra deft's memorandum in support of its motion for summary judgment, filed

Apr. 29 Settlement conference memorandum, Naythons, Mag., J., filed

Apr. 29 TRIAL, non-jury, witnesses called & sworn, filed

Apr. 30 Trial of 4/29/76 resumes, filed

Apr. 30 Trial of 4/30/76 resumes, filed

May 4 Trial of 5/3/76 resumes, filed

May 5 Trial of 4/4/76 resumes, filed

May 6 Trial of 4/5/76 resumes, filed

May 10 Trial of 5/6/76 resumes, filed

DATE	PROCEEDINGS
1976	
May 27	Oral deposition of Dr. Max Boyd McQueen, filed
May 27	Stipulation to testimony of economic loss based upon total unemployability, filed
May 27	Trial of 5/27/76 resumes, filed
Jul. 22	Trial of 7/21/76 resumes, filed
Aug. 11	Deft's findings of fact and conclusions of law, filed
Aug. 30	Oral deposition of Joseph J. Peters, M.D., filed
Oct. 6	Deposition of Dr. Eleanor Ross, filed.
Dec. 27	Transcript of testimony held on 5/4/76, filed
1977	
Jul. 22	OPINION & ORDER, Becker, J. that judgment is entered in FAVOR of the plff. and AGAINST the Government in the sum of $320,536.00, filed EB 7/25/77 entered & copies mailed
Jul. 25	ORDER that judgment is entered in FAVOR of plff. and AGAINST the deft. in the sum of $320,536.00, filed EB 7/26/77 entered & copies mailed
Sep. 20	Deft's notice of appeal received on 9/20/77 at 8:30 A.M., filed 9/21/77 copies to; U.S. Att'y, Sagot, & K, K & H
Sep. 20	Copy of Clerk's notice of U.S.C.A., filed
Sep. 26	Transcript of testimony, 7-Vols., filed
Sep. 26	Transcript of testimony of Dr. Robert Wolfson, filed
Oct. 10	ORIGINAL RECORD TRANSMITTED TO U.S.C.A. (except papers 73, 76 & 87) (77-2388)—USCA #

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 72-1815

WILLIAM A. KUBRICK

vs.

UNITED STATES OF AMERICA

COMPLAINT

The plaintiff herein is WILLIAM A. KUBRICK, who claims of the defendant herein the sum of Seven Hundred and Fifty Thousand ($750,000.00) Dollars upon a cause of action whereof the following is a statement:

1. The plaintiff herein, WILLIAM A. KUBRICK, is a citizen and resident of the Commonwealth of Pennsylvania residing at Mickley Run Apts., Mickley and Overlook Road, Building 800, Apt. 1, Whitehall, Pennsylvania.

2. The defendant herein is the UNITED STATES OF AMERICA.

3. Jurisdiction is based upon the Federal Tort Claims Act, 28 U.S.C. § 2674 et seq.

4. On April 2, 1968, the plaintiff, William A. Kubrick, a veteran of service in the U.S. Armed Forces, presented himself to and was accepted by the Veterans' Administration Hospital, Wilkes-Barre, Pennsylvania, as a patient and was then and there hospitalized and while a hospital patient at the aforesaid Veterans' Administration Hospital between April 2, 1968 and April 30, 1968, he received medical and surgical care and treatment which medical and surgical care and treatment was negligently and carelessly administered to him. As a result of the negligent, careless malpractice of medicine permitted upon the plaintiff, he sustained severe and permanent bilateral nerve deafness which has caused him to expend various and diverse sums of money in and about an effort to obtain medical care and treatment and has

caused him to suffer severe loss of earnings and earning capacity and has caused him to suffer severe mental anguish, deprivation and loss of life's pleasures, interfered with the normal pursuit of his life both occupationally and as a husband and father and has caused him severe emotional and psychic injury, all to his great detriment and loss.

5. The plaintiff, William A. Kubrick, in no way contributed to nor assumed the risk of the injury he suffered as a result of the medical malpractice, carelessness and negligence of the physicians, professional nursing staff, agents, servants and employees of the Veterans' Administration in whose care he found himself at the Wilkes-Barre, Pennsylvania Veteran's Administration Hospital.

6. Upon the plaintiff, William A. Kubrick's learning for the first time that the injuries he suffered during his hospitalization of April 2, 1968 to April 30, 1968 at the Veterans' Administration Hospital in Wilkes-Barre, Pennsylvania were the result of the medical malpractice, carelessness and negligence of the physicians, professional nursing staff, agents, servants and employees of the Veterans' Administration, he filed a claim with the Veterans' Administration. On August 9, 1972, the Veterans' Administration denied that claim; hence, plaintiff's complaint is timely under the provisions of the Federal Tort Claims Act, 28 U.S.C. § 2675 et seq.

ETTINGER, POSERINA, SILVERMAN,
DUBIN, ANAPOL AND SAGOT

By /s/ Paul R. Anapol
PAUL R. ANAPOL
Counsel for Plaintiff

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

CLAIM NO. 17381329

KUBRICK, WILLIAM A.

The following statement is made in connection with a claim for benefits in the case of the above named veteran:

PLEASE CONSIDER THIS AS A SUPPLEMENTAL CLAIM FOR A BILATERAL DEFECTIVE HEARING CONDITION AS THE RESULT OF MEDICATION PROSCRIBED DURING MY PERIOD OF HOSPITALIZATION AT THE V.A.H. WILKES-BARRE, PA. IN APRIL 1968. SINCE MY PERIOD OF HOSPITALIZATION AT VAH-W-B, PA I HAVE BEEN RECEIVING TREATMENT FROM VARIOUS PHYSICIANS AND SINCE OCTOBER 1968 I HAVE BEEN RECEIVING TREATMENT BY DR. JOSEPH SATALOFF—1721 PINE ST. PHILADELPHIA, PA AND HE IS OF THE OPINION THAT AS THE RESULT OF MEDICATION PROSCRIBED A RESULTANT HEARING CONDITION OCCURRED.

IT WOULD BE APPRECIATED IF YOUR OFFICE WOULD WRITE DIRECT TO DR. JOSEPH SATALOFF IN FURTHER DEVELOPMENT OF MY EXAMS AND I AM SURE THAT DR. WILL COOPERATE.

4-16-69 /s/ William A. Kubrick
728 Lincoln St. Dickson City, Pa 18519

VA FORM 21-4138
JAN 1967

EXHIBIT A 2

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

Claim No. C 17 381 329

Kubrick William A.

The following statement is made in connection with a claim for benefits in the case of the above named veteran:

I recieved [sic] the decision of August 4, 1969, denying service connection for my claim for the loss of my hearing and the ear consition [sic] I now have. I am disatisfied [sic] with this decision and feel it is unjustified.

On April 2, 1968, I was admitted to the Wilkes-Barre Veterans Hosp. I was in severe pain, with my back and legs. It was necessary for me to undergo surgery the following day. I remained at the hosp a full month completely a bed patient, being allowed up in a wheel chair only the last 5 days of my stay there. I was discharged early in May 1968 to recuperate at home until July 1968, when I returned to my employment.

During my entire life, and when I entered the V.A. hoppital [sic] on April 2 1968, I HAD PERFECT HEARING AND NEVER ANY EAR PROBLEMS, WHICH IS A POSITIVE FACT.

It was after my hospitalization of April 1968, the first signs of my hearing problem appeared. I did seek proffessional [sic] help from a Philadelphia Ear Specialist, Dr. Joseph Sataloff, under whos care I have been since and still presently under, He did request and review all past medical history. I was informed the medication given during my hospitalization of April-May 1968, was definately [sic] responsable [sic] for my loss of hearing. (He also further informed me this condition can neither can never be corrected by either surgery or any type hearing aid.) [sic] Through all this I have suffered a great deal both phsysically [sic] and mentaly [sic] not to mention the strain it has placed on my wife and children, also there is the financial strain paying for all the Medi-

cal expenses, travel expense, loss of time from work and now finally the possibility of losing my employment.

Sept. 25, 1969 /s/ William A. Kubrick

728 Lincoln St. Dickson City, Penna. 18519

Exhibit A-5

VA FORM 21-4138
JAN 1967

October 15, 1970
728 Lincoln St.
Dickson City, Pa. 18519
C 17 381 329

Mr. Donald E. Johnson
Administrator of V. A. Affairs
Washington, D.C. 20420

Dear Mr. Johnson:

I wish to thank you for your prompt reply to my letter of Sept. 18 to Mr. Spiro Agnew.

In your letter you made mention you saw no basis for my reluctant attitude tward refusing certain recommended procedures suggested by the Administrations medical authorities. Needless to say, there is always a certain amount of risk involved when dealing with the Spine and the unfortunate results that can be the result of human error. As in the case of a local resident, who had been administed a Spinal as a anesthesia, Mrs. Clair Rossi, Peckville Pa., who never walked again and spent 15 years in a hospital bed until she died. I can sight many more examples and perhaps you could add to the list.

Mr. Johnson if I sound like too much of a Pessimist as your text in your letter hinted to, Please keep in mind I already have gone through much, when I lost my Hearing as the result of a Medical Error, whether or not the Veterans Administration cares to recognize the truth even after being presented with evidence from the most competent sources. When offered this evidence the original reason for denial was dropped and a new Idea was introduced by the board members, that of the possibilities of having a hearing problem prior to the hospital stay of April 1968, Upon hearing this new theory I spontaneously offered sources where information could be obtained to disprove this new theory. I did sign papers authorizing them to do so. I have sent for my own copies of this information to Tobyhanna Army Depot where I had been employed prior to this misfortune, where a routine record of audio test given there, proves I had good hearing prior to this hospitalization. I sent for these papers last July

when I returned from Washington, and recieved them within a week, I was informed by the V.A. district office in Phila. oct 8, when I stopped in while on route to my monthly visit to Dr. Jos. Sataloff, they had just sent for this evidence that day. I can only comment Two and one half years is not much time, except for the one bearing the burden.

It was mentioned in your letter the $96.00 I receive for my 40 per cent disability is intended as merely a supplament to my impairment of earning capacity. It may be intended for this purpose however when a man has been unable to work for over nine months and must spend on the average of $60.00 per month for medical expense for audio problems it then becomes more than perhaps a supplament but a means of my living.

According to recent News Media I see I am not alone with my problems or opinions and I am aware of your opinion as given to top agency officials that conditions and criticsm of V.A. Medical Facilities are exaggerated and unwarrented espicially those presented by Life Magazine. All I care to say in the matter, I suffered the consequence of an error, told the truth, produced sufficient reputable evidence and then suffer further because someone does not feel they can admit to the truth of making a mistake.

If you contend my evidence to be wrong and the diagnosis given by Dr. Sataloff, Bethesda Naval Hosp. and specialist from Mass. Eye and Ear Hospital incorrect I would be the one most pleased as then I can look forward to a restoration of my hearing instead of facing the facts they all told me that I must live with this as there is no known correction for this, surgery or otherwise and further stated a hearing aid would be useless. Perhaps you recommend me to a hospital or doctors capable of correcting this error.

Sincerely,

/s/ William A. Kubrick
WILLIAM A. KUBRICK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2388

WILLIAM A. KUBRICK, APPELLEE

v.

UNITED STATES OF AMERICA, APPELLANT

Present: ADAMS, WEIS and GARTH, *Circuit Judges.*

ORDER

Upon consideration of appellant's Motion to Amend the opinion of the court filed on July 27, 1978, it is

ORDERED that the motion is denied.

BY THE COURT,

/s/ Joseph Weis, Jr.
Circuit Judge

DATED: September 13, 1978

Report on KUBRICK, William A.
or
REPORT OF BOARD ACTION
Continuation of S.F. 8/11/69

CLINICAL RECORD

1. A Board composed of Doctors H. Stuart Irons, Jr., Milton Kantor, and Edward R. Janjigian, met on this date to consider whether an alleged hearing loss, discovered on the above-named patient has any relationship to the use of Neomycin during a period of prior hospitalization.

2. The above-named patient was hospitalized here from 4/2/68 to 4/30/68, because of recurrent osteomyelitis of the right femur. On 4/3/68, incision and drainage of a small abscess cavity adjacent to the posterior lateral aspect of the right femur was carried out. Two Hemovac tubes were placed in the cavity and brought out through separate stab wounds. Two days later topical 1% Neomycin solution was used for a total period of 10 days. This was applied in the form of an irrigation with a Neomycin solution dripped through one Hemovac tube with suction being maintained on the second tube. At no time did the patient receive Neomycin systemically. Review of the C-Folder revealed the result of air conduction tests but no complete audiogram, and no previous data to indicate whether or not the patient had any hearing loss prior to April 1968.

3. The nephrotoxic and ototoxic adverse reactions mentioned in the package literature concerning Mycifradin, or Neomycin, apply only to its use systemically. The only adverse reaction mentioned in regard to topical use is the occasional production of a sensitivity reaction on abraded skin. Furthermore, the Board knows of no reports in the literature of eighth nerve damage from limited topical use of this drug. The topical use of Neomycin, particularly in solution, as in the present case, is common practice at this hospital, particularly on the Surgical Service, and adverse reactions are unknown.

For these reasons, and because in the present case the solution was run into the wound through one tube and out the other, with a very small quantity of solution in contact with tissue at any one time, the Board is of the opinion that there is no relationship between the use of Neomycin in this case and the alleged hearing loss.

4. In view of the above the Board, therefore, finds no evidence of carelessness, accident, negligence, lack of proper skill, error in judgment, or any other fault on the part of the Government.

/s/ Stuart Irons, Jr.
STUART IRONS, JR., M.D.
Chief, Surgical Service
(Chairman)

/s/ Milton Kantor, M.D.
MILTON KANTOR, M.D.
Chief, Medical Service
(Member)

/s/ Edward R. Janjigian
EDWARD R. JANJIGIAN, M.D.
Chief, Psychiatry & Neurology Service
(Member)'

[SEAL]

VETERANS ADMINISTRATION
Center
Wissahickon Ave. and Manheim St.
P.O. Box 8079
Philadelphia, Pa. 19101

Sep. 5, 1969

Your File Reference:

In Reply Refer to:
C 17 381 329
310/211A

Mr. William A. Kubrick
728 Lincoln St.
Dickson City, PA 18519

Dear Mr. Kubrick:

We have carefully reviewed your claim for service connection, for defective hearing.

It has been determined that your alleged hearing loss is not medicinally or medically attributable to your recent hospitalization at the VA Hospital, Wilkes-Barre, PA. Accordingly, your claim is disallowed.

You will continue to receive $43 monthly for your back condition.

Sincerely yours,

/s/ R. J. McCauley
R. J. MCCAULEY
Adjudication Officer

Enclosure
21-4107

cc:
DAV

Include Zip Code in your return address and give veteran's social security number.

September 26, 1969

C 17 381 329

VETERANS ADMINISTRATION CENTER
P. O. BOX 8079
PHILADELPHIA, PA 19101

STATEMENT OF THE CASE

IN THE APPEAL

OF

WILLIAM A. KUBRICK

FROM THE DECISION OF THE
VETERANS ADMINISTRATION

NOTICE TO APPELLANT:

This is not a decision on the appeal you have initiated. It is a "Statement of the Case" which the law requires us to furnish to help you in completing your appeal.

Please read the forwarding letter carefully, as well as the instructions on the enclosed appeal form. These explain your appeal rights and tell you what you must do to complete your appeal.

A copy of this "Statement of the Case" has been furnished your representative: DAV

ISSUE:

1. Entitlement to increased compensation for a service connected back condition, lumbrosacral strain.

2. Entitlement to service connection for defective hearing claimed as secondary to hospital treatment of nonservice connected osteomyelitis, right femur.

Veteran contends that his defective hearing was the direct result of treatment he received at the Veterans Administration Hospital, Wilkes-Barre, Pa., in April 1968, and that his back condition has increased in severity.

SUMMARY OF EVIDENCE AND ADJUDICATION
ACTION:

Service:	October 1950 to September 1951. Honorable
April 2, 1968 to April 30, 1968:	Report from Veterans Administration Hospital, Wilkes-Barre, Pa., reveals veteran hospitalized for increasing pain in right thigh. A small abscess adjacent to posterior aspect of right femur was incised and drained. He was placed on oral poly-cillin and neomycin irrigation through Hemovac tubes. He improved, the wound healed and tubes were removed. He became ambulatory without complaints and was discharged to the care of his own physician. The diagnosis was osteomyelitis of the right femur.
June 14, 1968:	The Rating Board denied service connection for osteomyelitis of the right femur since it was not found to be related to the veteran's lumbosacral strain. He was notified of this decision by letter dated June 24, 1968.
August 28, 1968:	Pursuant to veteran's claim for increased compensation for his back condition a physical examination was scheduled and disclosed mild muscle spasm in the paravertebral lumbar area. Forward bending was limited by about thirty percent (30%), finger-tips twelve inches (12") from floor. There was lack of lordotic curve, and discomfort in recovering from bent position. Backward flexion was only slightly limited with some discomfort at extreme. Motions in lateral components were not restricted or symptomatic. X-ray of low back on June 10, 1968, of the lumbar vertebrae, and bones of pelvis revealed no gross abnormalities.

September 26, 1968: Based on a review of the foregoing examination and the veteran's Outpatient Treatment Records, which showed he reported June 10, 1968, for a lumbosacral support, the Rating Board increased the evaluation for his back condition to twenty percent (20%), effective the date he reported for the brace. He was notified of this increase by letter dated October 2, 1968.

April 17, 1969: Veteran's supplemental claim received for service connection for defective hearing, which he alleges was the result of medication prescribed during his hospitalization at the Veterans Administration Hospital, Wilkes-Barre, Pa. in April 1968.

July 2, 1969: Medical statement dated June 30, 1969, received from Joseph Sataloff, MD, who diagnosed the veteran's condition as "cochleites", and commented that there was an excellent chance that the veteran's hearing loss was the result of neomycin toxicity. He enclosed a copy of an audiogram showing hearing loss, particularly in the upper ranges. This was on air conduction test only, which the doctor said indicated a progressive degeneration.

August 11, 1969: A Board of Physicians was convened to consider whether the veteran's hearing loss had any relationship to the use of neomycin during his period of hospitalization in April 1968. They found that on April 3, 1968, there was an incision and drainage of a small abscess cavity adjacent to the posterior lateral aspect of the right femur. Hemovac tubes were placed in the cavity, and two days later

topical 1% neomycin solution was used for 10 days. At no time did veteran receive neomycin systemically. They further found that the adverse reaction mentioned in the package literature concerning neomycin applied only to its use systemically, the only adverse affect of topical use, particularly in solution, as in this case and as in the common practice in the hospital, was a sensitivity reaction on an abraded skin. Adverse reactions in the topical use as indicated were unknown from experience. Because of the topical use, and the fact that only a very small quantity of solution was in contact with tissue at any time, the Board was of the opinion that there was no relationship between the use of neomycin and the claimed hearing loss. They found no evidence of carelessness, accident, negligence, lack of proper skill, error in judgment, or any other fault.

August 28, 1969: The Rating Board considered the issue of service connection for defective hearing, and after a comprehensive review of the entire record, determined that the veteran had no additional disability resulting from medical or surgical treatments. The twenty percent (20%) evaluation for his back condition was continued. He was notified of this decision by letter dated September 5, 1969.

September 9, 1969: Veteran's claim for increased compensation for his back condition received, requesting a review of his Outpatient Treatment Records for this purpose.

September 19, 1969: Inquiry from the Honorable Joseph M. McDade, Member of Congress, accepted as veteran's Notice of Disagreement.

September 24, 1969: Outpatient Treatment records were reviewed, and an examination on September 3, 1996, revealed veteran's forward bending of trunk was restricted to fifty percent (50%), backward bending and to either side was moderately restricted. He had difficulty doing a squat and assuming an erect position thereafter. Veteran indicated his symptoms were about the same. He wore a back brace from which he said he derived benefit, and which fit properly and was in good condition. On September 17, 1969, he denied improvement, but was able to sit, rise, stand and walk with ease. X-rays of the lumbar vertebrae on September 3, 1969, showed no gross abnormalities.

C 17 381 329
KUBRICK, William A.

On this same date the Rating Board reviewed the Outpatient Treatment records, found no increase in evaluation was warranted, and confirmed the Rating action of September 26, 1968 and August 28, 1969.

PERTINENT LAW, REGULATIONS:
RATING SCHEDULE PROVISIONS:

Disability evaluations are determined by the application of a schedule of ratings which is based on average impairment of earning capacity. (38 U.S.C. 355; 38 C.F.R. 4.1)

The veteran's lumbrosacral strain is evaluated as twenty percent (20%) disabling because there is moderate limitation of motion, mild muscle spasm, difficulty on forward bending and characteristic pain on motion. For a fourth [sic] percent (40%) evaluation, there must be listing of the whole spine to the opposite side, positive Goldthwait's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of joint space, or some of the above with abnormal mobility on forced motion. (38 C.F.R. Part 4, Code 5295)

Where a veteran suffers an injury, or aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or examination, and such injury or aggravation results in additional disability, compensation may be awarded in the same manner as if such disability were service connected. (38 U.S.C. 351)

Compensation may not be payable for either the usual or the unusual results of approved medical care properly administered, where the evidence does not show that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment or other instances of indicated fault on the part of the Veterans Administration. (38 C.F.R. 3.358(c)

DECISIONS:

1. Entitlement to increased compensation for service connected back condition is not warranted.

2. Entitlement to service connection for defective hearing as being due to hospital treatment is not established.

REASONS FOR DECISION:

The actual symptomatology as presented on examination does not reveal the more severe conditions as are set forth above and required for an increase in compensation for the veteran's service connected back condition. In comparison with previous examinations there has been little change shown since the increase was granted effective June 10, 1968. The symptomatalogy does not meet the schedular requirements for a higher evaluation.

It has not been shown that the treatment afforded the veteran for his nonservice connected osteomyelitis had any causal relationship to his claimed defective hearing or diagnosed inflammation of the inner ear. The statement from his physician was speculative, suggestive of a possibility, not a positive finding. The topical use of neomycin in solution in the irrigation process is medically acceptable and proper following surgery, and the hospital has had no adverse reactions when it is so used. The known adverse reaction, and that on which the veteran bases his claim, is where it is administered systemically, which was not done in this case. No carelessness, accident, negligence, lack of proper skill, error in judgment or other instance of indicated fault on the part of the Veterans Administration has been shown, so that the decision denying service connection for additional disability due to hospital treatment is found correct and affirmed.

Submitted: /s/ [Illegible]

Date: September 29, 1969

Approved: /s/ [Illegible]

Date: 9-29-69

BOARD OF VETERANS APPEALS

Washington, D.C. 20420

IN THE APPEAL OF

WILLIAM A. KUBRICK
C-17 381 329

FINDINGS AND DECISION

Date: Sep 10 1970

DOCKET NO. 70-09 856

THE ISSUE

Entitlement to service connection for defective hearing and entitlement to an increased rating for back condition.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESSES AT HEARING ON APPEAL

William A. Kubrick, appellant, and Mrs. William A. Kubrick

EXHIBIT "D"

ACTIONS LEADING TO PRESENT APPELLATE STATUS

The appeal is from actions of the agency of original jurisdiction which denied service connection for defective hearing and which increased a ten per cent (10%) rating for service-connected lumbosacral strain to a twenty per cent (20%) rating effective June 10, 1968, and which increased the twenty per cent (20%) rating to forty per cent (40%) effective September 3, 1969, for lumbosacral strain with possible herniated intervertebral disc of the lumbosacral joint. A total hospital rating was assigned from January 13, 1970, through February 28, 1970, and the prehospital schedular rating of forty per cent (40%) was assigned effective March 1, 1970. The veteran has no other service-connected disability.

CONTENTIONS

It is contended that the medical evidence shows many clinical symptomatic findings of the back condition, progressive in nature, which require periodic outpatient treatment and hospitalization, the use of a lumbosacral back brace, medications, a bedboard and exercises; and that the symptoms are such as to produce discomfort and pain on all motions.

THE EVIDENCE

Mr. Kubrick was hospitalized by the Administration in April 1968 because of acute osteomyelitis of the right femur.

The outpatient treatment records show that the lumbosacral support was prescribed on June 10, 1968, and fitted later in the same month. The veteran complained of recurrent low backache in July 1968.

When the veteran was examined by the Administration in August 1968, he complained that his back ached constantly and that lifting was very limited. He reported that he wore a back support most of the time. He slept

poorly due to back pain. He was employed as a machinist and lost occasional days from work due to sickness. The examination revealed mild muscle spasm in the paravertebral lumbar area. Forward bending was limited by about 30 per cent. The finger tips came to within 12 inches of the floor. There was a lack of lordotic curve. He complained of discomfort in recovery from the bent position. Backward flexion was only slightly limited. Lateral motion was not restricted. It was stated that an X-ray examination in June 1968 had disclosed no gross abnormalities. The diagnosis was lumbosacral strain.

The veteran returned to the outpatient treatment service in July 1969 with complaint of backache. On September 3, 1969, he complained of pain in the lower back with radiation down the legs. An examination showed 50 per cent restriction of forward bending and moderate restriction of backward and lateral bending. He had difficulty in doing a squat and in recovering from it. Later in September 1969, it was stated that he sat, rose, stood and walked with ease. In October 1969, the veteran reported that heat treatment did not help him. He requested stronger medication.

In October 1969, he reported that his back brace was uncomfortable in a sitting position. An examination disclosed about 30 per cent limitation of motion of the lumbar spine. There was no sciatic tenderness. Straight leg raising was negative. Reflexes were equal and active bilaterally. A review of the X-rays revealed no narrowing of the intervertebral spaces. Williams' [sic] exercises were prescribed. In November 1969, it was stated that the veteran was apparently not following through with the prescribed exercise program.

Mr. Kubrick was hospitalized in January and February 1970 for observation for osteomyelitis of the right femur. On examination there was limitation of motion of the lumbrosacral spin. Straight leg raising was to 50 degrees. There was no tenderness on palpation over the vertebral column or in the paravertebral area. An X-ray examination disclosed narrowing of the lumbrosacral joint

space. The veteran refused further hospitalization for a myelogram. A diagnosis was made of possible herniated nucleus pulposus.

A bedboard was authorized by the outpatient treatment service later in February 1970. In March, April and May 1970, the veteran continued to complain of pain and that he was unable to return to work.

At a hearing on appeal before the Board in July 1970, the veteran testified that he could not perform his duties as a machinist due to his back condition. His job required standing for long periods of time, bending, lifting, etc. He was also restricted in doing things around the house. He wore a back brace every day. He usually did not wear it except when he went out or was a little active. He did normal housework and sometimes went shopping with his wife. He drove an automobile. Mrs. Kubrick stated that she had seen him go to work under the influence of medication, and hoped and prayed that he would not fall on the machines. He had to go to work because of his responsibilities.

THE LAW AND REGULATIONS

Disability evaluations are determined by the application of a schedule of ratings which is based on average impairment of earning capacity. (38 U.S.C. 355; 38 C.F.R. Part 4) Separate diagnostic codes identify the various disabilities.

A twenty per cent (20%) rating is provided for lumbrosacral strain where there is muscle spasm on extreme forward bending, loss of lateral spine motion, unilateral, in standing position. A forty per cent (40%) rating is provided for severe lumbrosacral strain where there is listing of the whole spine to the opposite side, positive Goldthwait's sign, marked limitation of forward bending in standing position, loss of lateral motion with osteoarthritic changes, or narrowing or irregularity of the joint space, or some of the above with abnormal mobility on forced motion. The forty per cent (40%) rating is

the maximum provided by the schedule for rating disabilities. (Code 5295-5294)

DISCUSSION AND EVALUATION

Herniated nucleus pulposus of the intervertebral disc of the lumbrosacral joint has not been clinically demonstrated as the veteran did not desire to undergo the necessary laboratory procedures to substantiate or rule out this disease.

FINDINGS OF FACT

1. The veteran was fitted with a back support in June 1968, but continued to complain of back pain.

2. An examination in August 1968 disclosed mild paravertebral muscle spasm, 30 per cent limitation of forward bending, a slight limitation of backward extension and no limitation of lateral motion.

3. An examination in September 1969 revealed a complaint of pain in the low back with radiation into the legs, 50 per cent restriction of forward flexion, moderate restriction of backward extension and lateral motion, and difficulty in doing a squat.

4. An examination in October 1969 revealed no sciatic tenderness.

5. During hospitalization in January and February 1970, there was no tenderness on palpation over the vertebral column or in the paravertebral area. X-ray evidence showed narrowing of the intervertebral space of the lumbrosacral joint.

CONCLUSIONS OF LAW

1. The schedular provisions for a rating in excess of twenty per cent (20%) for lumbrosacral strain effective January 10, 1968, are not met. (38 U.S.C. 355; 38 C.F.R. Part 4 (Code 5295-5294))

2. A forty per cent (40%) rating, the maximum rating provided by the schedule, has been assigned effective September 3, 1969, for lumbrosacral strain. (38 U.S.C. 355; 38 C.F.R. Part 4 (Code 5295-5294))

DECISION

Entitlement to an increased schedular rating for lumbrosacral strain is not established and, to this extent, the appeal is denied.

REMAND

From a review of the evidence now available on the issue of service connection for defective hearing, it is the decision of the Board that the case be REMANDED for the following action:

1. The agency or original jurisdiction should obtain reports from Stanley Mazaleski, M.D., 166 North Main Street, Old Forge, Pennsylvania 18518, and from Joseph J. Soma, M.D., 327 North Washington Avenue, Scranton, Pennsylvania 18503, as to examinations and treatment for the veteran's ears from June until August 1968.

2. There should also be obtained copies of the veteran's examinations for employment at Tobyhanna Military Depot, Tobyhanna, Pennsylvania, in October or November 1966, and from R.C.A., Keystone Industrial Park, Dunmore, Pennsylvania, in December 1966.

When the development has been completed, the claim should be reviewed by the originating agency and reprocessed in accordance with current appelate [sic] procedures. No action is required of the veteran unless he receives further notice.

/s/ John G. Riggins
JOHN G. RIGGINS, M.D.
Associate Member

/s/ I. Kleinfeld
I. KLEINFELD
Associate Member

/s/ J. L. Ray
J. L. RAY
Acting Associate Member

VA Form 21-6796b

Rating Decision | File No. C 17 381 329

May 6, 1971 | W. A. KUBRICK

(Item 20. Narrative)

J. BVA remand—claim for increase 9-18-70.

I. SC for bilateral hearing loss.

Entitlement to total disability due to individual unemployability.

F. BVA remanded case 9-10-70 for additional development relating to question of SC for hearing loss as result of medical treatment.

BVA affirmed evaluation of 40% for the lumbrosacral strain.

Report 11-21-70 from S. Mazaleski, M.D., Old Force, Pennsylvania disclosed treatment from 6-68 to 8-68 for bilateral deafness, cause undetermined. He was interviewed by V.A. Field Examiner on 1-26-71. The doctor related he treated veteran for colds in past without indicating or revealing any treatment for hearing, that he referred veteran to Dr. Soma for ears since he did not treat ears. He had no records and therefore unable to provide any dates of treatment. Statement from J. J. Soma, M.D., Scranton, PA dated 11-21-70 disclosed he examined veteran 8-27-68 for complaints of noise both ears, for some period of time. Veteran had worked as Machinist. There were no other significant ENT or systemic complaints. Audiometric testing disclosed bilateral sensory neural hearing loss involving high tones. DB loss right ear 30 (2000 cycles) 65 (4000 cycles) left ear 40 (2000 cycles) 70 (4000 cycles). VA Field Examiner interviewed Dr. Soma on 1-26-71. The doctor furnished original records which were

photostated and were essentially as cited above. The doctor felt that the hearing problem was result of veteran's employment in the Machine Shop. Letter to Dr. Mazaleski 8-30-68 noted complete history of his patient obtained, that he felt the hearing loss due to acoustic trauma and institute therapy with naso-dilators. Veteran did not return for follow-up.

Civil Service Medical examination 9-20-66 disclosed normal hearing on audiometric exam thru 4000 cycles, both ears.

Pre-Placement Status Exam done at RCA, Dunmore, PA 12-2-66 revealed hearing acuity of 20/20 bilaterally.

In addition veteran submitted statements from his Pastor, Fraternal Brothers and friends all stating that veteran did not have a hearing disability prior to April 1968 and that after April 1968 he had a hearing defect.

Cited VA exam revealed relatively normal ears, that veteran gave history of hearing loss first noticed in June or July 1968, that he had continuous ringing in ears. Audiometric testing revealed db loss of 90 at 2000 cycles with average of 42 db loss right ear; SRT of 90 with 0% discrimination ability left ear (E-F).

With respect to his back disability, veteran submitted no additional medical evidence. OPT revealed he was treated frequently since at OPC for complaints relating to his back. Exam 6-17-70 revealed no neurological findings. X-rays of LS spine were not remarkable. He complained of constant pain, used bed board.

In his F527 dated 9-16-70 veteran stated he has been unable to work since 1-13-70 because of his chronic lumbrosacral strain.

D. A review of the record including all the evidence obtained as result of the BVA remanded decision and the additional evidence including current VA exam does not show that the veteran's hearing disability was due to any carelessness, lack of medical skill, negligence or error in judgment, malpractice or other known neglect on part of the Staff of the VA Hospital.

In fact, veteran's own private ENT Specialist indicated that the hearing loss was felt to be due to veteran's previous employment as a Machinist and was due to accoustic trauma.

With respect to entitlement to Code 18, Pr. 16 benefits, veteran's SC lumbrosacral disability does not meet the schedular requirements for his benefits. The medical record does not show entitlement in excess of 40% for the back disability.

Entitlement to total disability as result of individual unemployability is not established.

Prior decisions are confirmed and continued.

VA Center
Philadelphia, PA 19101

C 17 381 329
KUBRICK, William A.

Representative: VFW

SUPPLEMENTAL STATEMENT OF THE CASE

This Supplemental Statement of the Case is furnished to inform you of all evidence received after the Statement of the Case was mailed to you on September 29, 1969.

ISSUE:

1. Entitlement to service connection for defective hearing.

2. Entitlement to an increased evaluation for a service connected back condition.

SUMMARY OF EVIDENCE AND ADJUDICATION ACTIONS:

See Statement of the Case dated September 26, 1969.

September 28, 1969	A letter from the Honorable Joseph M. McDade, Member of Congress, in behalf of the veteran was received.
September 30, 1969	A statement from Dr. J. Sataloff was received stating that there was a very excellent possibility that the veteran's hearing damage could have been due to the use of neomycin by irrigation.
December 29, 1969	A letter from the Honorable Hugh Scott, United States Senate, in behalf of the veteran was received.
January 5, 1970	The veteran filed a substantative appeal.
January 15, 1970	A copy of the veteran's letter to the Honorable Richard S. Schweiker, United States Senate, was received.
February 13, 1970	VA Hospital report was received showing the veteran was admitted to the hospital on January 13, 1970, for his back and leg condition.

February 25, 1970	VA Hospital report was received showing the veteran was hospitalized from January 13, 1970 to February 16, 1970. X-rays of the lumbar spine were unremarkable. There was a possibility of a herniated disk. Examination revealed limitation of motion in the lumbosacral spine and some pain on straight leg raising at approximately 50 degrees of elevation. No evidence of active difficulty was found with the right femur. An audiogram showed his hearing was decreased in acuity in each ear. The veteran refused a myelogram. He was discharged with maximum hospital benefits on February 16, 1970.
March 2, 1970	The outpatient treatment records were received showing the veteran was seen on September 3, September 17, October 14, October 15, November 24, and December 15, 1969. Examination of back revealed motion is limited to 30%. There were abnormal curvatures of the spine. No sciatic notch tenderness. Straight leg raising was negative. Reflexes equal and active bilaterally. X-rays revealed no narrowing of the intervertebral spaces. No abnormal position of the bones. Physical therapy by therapist was not doing any good.
March 5, 1970	The Rating Board increased the veteran's evaluation for his back condition to a temporary one hundred percent (100%) from January 13, 1970 to February 28, 1970 because of hospitalization and reduced it to his prehospitalization evaluation of forty percent (40%) from March 1, 1970. The veteran was notified by letter dated May 21, 1970.

July 13, 1970	A copy of a letter dated January 22, 1970, from Dr. H. F. Schuknecht to the veteran was received stating neomycin was a very ototoxic drug which could be absorbed into the system when used as an irrigating solution. At a hearing held before the Board of veterans Appeals in Washington, D.C., the veteran restated that his defective hearing was the result of the drug "neomycin" and his back condition increased in severity.
September 10, 1970	The Board of Veterans Appeals remanded the case for further development regarding service connection for defective hearing and determined an increased evaluation for a lumbosacral strain was not warranted. A copy of the decision was forwarded to the veteran.
September 18, 1970	The veteran filed VAF 21-527, Statement of Income, Net Worth and Employment, showing veteran last worked on January 2, 1970.
October 8, 1970	Civil Service examination dated September 20, 1966, showed ears to be normal.
October 12, 1970	VA Outpatient treatment records were received showing the veteran was seen on February 24, March 9, April 1, May 1, and May 27, 1970. Veteran continued to have pain and there was no change in the back condition.
October 22, 1970	RCA examination dated December 2, 1966 was received showing hearing 20/20 both ears.

October 27, 1970 — VA Outpatient treatment records were received showing the veteran was seen on June 17, June 29, July 30 and August 28, 1970. Veteran continued to have back pain and was unable to work.

October 29, 1970 — A statement from J. Fred Parkyn, minister was received stating he knew the veteran since June 1966 and he had no difficulty with his hearing prior to his hospitalization in April 1968.

A statement from William F. Demming was received stating he and two friends visited the veteran on or about the last Sunday in April 1968 and said the veteran could hear everything said. He stated in the middle of 1969 his hearing was so bad the veteran could not tell what was going on at lodge meetings.

November 26, 1970 — A statement signed by friends was received stating he had no difficulty with his hearing prior to his illness on or about April 1968.

November 28, 1970 — Dr. J. J. Soma's statement was received showing he examined the veteran on August 27, 1968. Audiometric examination revealed bilateral sensory neural hearing loss, involving high tones. He was placed on antivert for a trial period and was to return in one week. There was no follow-up visit and no further evaluation or therapy.

February 19, 1971 — VA Field Examination Report: Dr. J. J. Soma stated after examining the veteran on August 27, 1968, he concluded that the veteran's problem was a result of his employment in the machine shop. He stated he planned on treating the veteran along such lines, but he never came back for further treatment.

Dr. S. Mazaleski stated he treated the veteran for colds in the past. He said he did not treat ears and referred the veteran to Dr. Soma. When asked if he would provide dates of treatment, diagnosis or medication, Dr. Mazaleski stated he did not want to get involved and had no record on the veteran.

March 29, 1971 — VA audiometric examination: right ear in the 500, 1000 and 2000 cycles showed 10, 25 and 90, left ear—speech reception threshold 90 decibels—discrimination ability zero percent (0%). Right ear showed percipitous sensori-neural depression with moderately depressed discrimination. Left ear showed severe sensori-neural depression, with no usable hearing for speech discrimination.

May 6, 1971 — The Rating Board reviewed all evidence and confirmed and continued prior ratings. The veteran did not meet the schedular requirements for individual unemployability. Entitlement to a total rating due to individual unemployability was not established.

PERTINENT LAWS: REGULATIONS: RATING SCHEDULE PROVISIONS:

See Statement of the Case dated September 26, 1969.

DECISION:

1. Entitlement to service connection for defective hearing is not established.

2. Entitlement to an increased evaluation for a service connected back condition is not warranted.

REASONS FOR DECISION:

See Statement of the Case

See Board of Veterans Appeals decision regarding an increase in evaluation for a service connected back condition which was denied.

The additional evidence including the current VA examination does not show the veteran's hearing disability was due to any carelessness, lack of medical skill, negligence or error in judgment, malpractice or other knowledge on the part of the staff of the VA Hospital.

The veteran's own ear, nose and throat specialist indicated that the hearing loss was felt to be due to the veteran's previous employment as a machinist and was due to acoustic trauma.

Submitted by: /s/ B. J. Cohen—5-20-71

Approved by: /s/ [Illegible]—5-20-71

JUNE 22 1971

C 17 381 329
310/211A

Mr. William A. Kubrick
728 Lincoln St.
Dickson City, VA 18519

Your disability compensation claim has been carefully reviewed based on all the evidence, including the medical statement of Dr. Joseph J. Soma.

The evidence does not warrant any change in the previous determination. There is no relationship between the use of neomycin and your defective hearing. Payments of $96 monthly will continue.

Please inform us by return mail if you are submitting any additional evidence prior to returning your case to the Board of Veterans Appeals.

M. H. TALLEN
Adjudication Officer

Enclosures

cc: VFW

BOARD OF VETERANS APPEALS
Washington, D.C. 20420

Docket No. 70-09 856

Date—August 9, 1972

FINDINGS AND DECISION

IN THE APPEAL OF

WILLIAM A. KUBRICK
C 17 381 329

THE ISSUE

Service connection for defective hearing under 38 U.S.C. 351.

REPRESENTATION

Appellant represented by: Paul R. Anapol, Attorney.

WITNESSES AT HEARING ON APPEAL

William A. Kubrick, appellant, and Mrs. William A. Kubrick.

ACTIONS LEADING TO PRESENT APPELLATE STATUS

The case was before the Board in September 1970 at which time it was remanded for additional development. This has been substantially accomplished and the case is now presented for further appellate review.

CONTENTIONS

It is contended, in substance, that the veteran developed defective hearing because, while he was a patient in an Administration hospital from April 2, 1968, to April 30, 1968, and due to negligence on the part of the

Veterans Administration and its personnel, Neomycin was inappropriately used.

THE EVIDENCE

A Civil Service examination report, dated in September 1966, showed essentially normal hearing, both ears.

An examination for Radio Corporation of America in December 1966 showed hearing 20/20, both ears.

The record includes the clinical records of the veteran's hospitalization by this Administration from April 2 to April 30, 1968. These records show that the 38-year-old veteran was admitted to the Veterans Administration Hospital at Wilkes-Barre, Pennsylvania, with progressively increasing pain of the posterolateral aspect of the right thigh of some two weeks' duration, associated with fever. He was being seen by a private physician who had been giving him pain pills. During hospitalization examination of the extremities disclosed fulness to palpation of the lower third of the posterolateral aspect of the right thigh. Examination of the ears was negative. Initial diagnosis was that of the osteomyelitis, right femur. On April 3, he had incision and drainage of a small abscess adjacent to the posterior aspect of the femur. Two hemovac tubes were introduced into the depths of the wound, one proximally and the other distally, through two stab wounds. He was placed on polycillin and Neomycin irrigation through the hemovac tubes. A one per cent topical solution of Neomycin was dripped through one tube and suctioned out of the other tube. On April 6, the Neomycin drip was not working. Dressings were reapplied. One hundred fifty cubic centimeters of bloody, thick, liquid were removed from the bellows. The skin was red in several areas of the thigh. On April 7, the Neomycin drip was running well. The leg was redressed. The bellows were emptied and 100 cubic centimeters of dark, brownish, red liquid were measured and discarded. On April 8, 1,000 cubic centimeters of one per cent Neomycin solution were added to irrigation. On April 10, 900 cubic centimeters of one per cent Neomycin solu-

tion were added to irrigation. The bellows were emptied of 90 cubic centimeters of rusty colored drainage. On April 11, an upper plastic tubing was removed and replaced with a Robinson catheter. On April 12, irrigation was not working properly. On April 13, irrigation was apparently working well. On April 14, 400 cubic centimeters of drainage were emptied from wall suction. On April 16, 900 cubic centimeters of one per cent Neomycin solution were added to the irrigation. On April 17, the tubes were removed. During hospitalization he became improved and became afebrile. Mr. Kubrick became ambulatory without complaints and was discharged with maximum hospital benefits on April 30, 1968, to return to the care of his own physician. The diagnosis was osteomyelitis, acute, right femur.

Joseph Sataloff, M.D., stated in June and September 1969 that he had treated the veteran since November 1968 for bilateral, ringing tinnitus; that the diagnosis was "cochleitis"; and that there was an excellent chance that the veteran's hearing loss was the result of Neomycin toxicity. He enclosed a copy of an audiogram showing hearing loss, particularly in the upper ranges, on air conduction tests. Dr. Sataloff stated that there was a progressive degeneration of the veteran's hearing in a period of several months.

A report, dated in August 1969, from a Veterans Administration Board of Physicians showed that they met to consider whether the veteran's hearing loss had any relationship to the use of Neomycin during his period of hospitalization in April 1968. They found that on April 3, 1968, there was an incision and drainage of a small abscess cavity adjacent to the posterolateral aspect of the right femur. Hemovac tubes were placed in the cavity, and two days later topical one per cent Neomycin solution was used for 10 days. This was applied in the form of an irrigation with Neomycin solution which dripped through one hemovac tube with suction being maintained on the second tube. At no time did the veteran receive Neomycin systemically. They found that the nephrotoxic and ototoxic adverse reactions to Neomycin applied only

to its use systemically and that the only adverse reaction in the package literature with regard to topical use was the occasional production of a sensitivity reaction on abraded skin. The topical use of Neomycin, particularly in solution, as in the present case, was common practice at the hospital and adverse reactions were unknown from experience. Because of the topical use and because in this case a solution was run into the wound through one tube and out the other, with a small quantity of solution in contact with tissue at any one time, the Board was of the opinion that there was no relationship between the use of Neomycin and the claimed hearing loss and that there was no evidence of carelessness, accident, negligence, lack of proper skill, error in judgment or other fault on the part of the Government.

There was received a copy of a letter, dated in December 1969, from the United States Department of Health, Education and Welfare. This showed that "polycillin" was the trade name for ampicillin and was not considered neurotoxic; and that neurotoxicity and ototoxicity were associated as adverse reaction to Neomycin when given parenterally.

During Veterans Administration hospitalization from January to February 1970, primarily for an unrelated condition, an audiogram showed decreased hearing acuity in each ear at the 2,000 to 8,000 frequency levels. The final diagnoses included sensorineural deafness.

Harold F. Schuknecht, M.D., reported in January 1970 that Neomycin was a very ototoxic drug which could be absorbed into the system when used as an irrigating solution.

At a hearing held before the Board of Veterans Appeals in July 1970, the veteran reiterated his contention that his defective hearing was the result of the use of Neomycin during hospitalization.

J. Fred Parkyn related in October 1970 that he had known the veteran since June 1966; and that he knew that the veteran had no difficulty with his hearing prior to his hospitalization in April 1968.

William F. Demming stated in October 1970 that he and two friends visited the veteran on or about the last Sunday in April 1968 and the veteran could hear everything that was said; and that in the middle of 1969 the veteran's hearing was so bad that he could not tell what was going on at lodge meetings.

There were received statements, dated in November 1970, from acquaintances of the veteran to the effect that he had no difficulty with his hearing prior to his illness on or about April 1968.

Joseph J. Soma, M.D., reported in November 1970 that he examined the veteran in August 1968; that audiometric examination revealed bilateral, sensorineural hearing loss, involving high tones; that he was placed on antivert for a trial period and was to return in one week; that there was no followup visit and no further evaluation.

S. C. Mazaleski, M.D., related in November 1970 that he treated the veteran from June to August 1968 for bilateral deafness, cause undetermined.

Thomas E. Pratt, Technical Manager of the Squibb Professional Services Department, stated in December 1970 that special study groups of the National Academy of Scientists—National Research Council had been evaluating drugs marketed prior to 1962; that one of these committees had questioned the value of intraperitoneal instillation of solutions of Neomycin—Sulfate because of the great risk of respiratory depression associated with such use; that they also found topical Neomycin of doubtful effectiveness with a high incidence of hypersensitivity, making this use hazardous; and that on this basis the Food and Drug Administration suggested certain revisions in prescribing information for Neomycin Sulfate Powder.

A report of Veterans Administration field examination dated in February 1971, revealed that the field examiner reported that Dr. Soma stated that after examining the veteran in August 1968, he concluded that his hearing

problem was a result of his employment in the machine shop. Dr. Soma reportedly planned to treat the veteran along such lines, but the veteran never returned for further treatment. The field examiner also related that Dr. S. Mazaleski stated that he had treated the veteran for colds in the past; that he did not treat ears and referred the veteran to Dr. Soma; and that he had no record on the veteran.

The veteran was examined by the Veterans Administration in March 1971. Audiometric testing disclosed bilateral, sensorineural hearing loss involving high tones.

Dr. Soma stated in June 1971 that he did not believe that the veteran's defective hearing was the result of acoustic trauma; and that, in his opinion, the veteran suffered from severe sensorineural hearing loss due to Neomycine absorption.

Mr. Paul Anapol, the veteran's representative, appeared at formal hearings before the Board of Veterans Appeals in January and March 1972. On the latter occasion there was submitted a statement from R. J. Bednarczyk Manager, Safety and Insurance, RCA. He reported that the veteran had been employed as a machinist by RCA; that in January 1970 he was granted medical leave; that in the event he could not return to work by January 1972, his employment would be terminated; and that considering the medical verification of the veteran's hearing condition that had been received, it was entirely possible that this might happen. There was also submitted a copy of a letter, dated in September 1971, from Dr. Sataloff. He stated that he first saw the veteran in November 1968 when he complained of having hearing loss and ringing and humming for about 3 or 4 months previously; that he also had marked hearing loss which seemed to be getting progressively worse; and that a review of his history and findings from the Veterans Administration indicated that he received Neomycin by irrigation; that the absorption of this Neomycin was the cause of his hearing loss; and that the diagnosis was bilateral nerve deafness due to ototoxic drug administration.

THE LAW AND REGULATIONS

Where a veteran suffers an injury, or aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or examination, and such injury or aggravation results in additional disability, compensation may be awarded in the same manner as if such disability were service connected. Compensation may not be payable for either the usual or the unusual result of approved medical care properly administered, where the evidence does not show that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, or other instances of indicated fault on the part of the Veterans Administration. (38 U.S.C. 351; 38 C.F.R. 3.358)

DISCUSSION AND EVALUATION

Before compensation may be paid in this case under 38 U.S.C. 351 and 38 C.F.R. 3.358, it must first be established that additional disability or aggravation of a preexisting disability resulted during hospitalization by the Administration as a proximate result of "indicated fault" on the part of the Veterans Administration. Such determination must be made on the objective medical findings prior and subsequent to hospitalization, and the veteran's complaints are not necessarily determinative of the question.

The principal question to be decided herein is whether the use of Neomycin was other than in accordance with approved medical standards and techniques carried out by duly qualified and trained hospital personnel. The evidence in the case clearly demonstrates that the veteran had osteomyelitis of the right femur prior to Veterans Administration hospitalization on April 2, 1968. During hospitalization he was placed on Neomycin irrigation. Defective hearing unfortunately may have resulted from this treatment. However, this Administration is not in the position of an absolute insurer against all possible side-effects which may occur as a result of medical treatment. Under applicable legal provisions, the veteran would not be entitled to service connection for defective hearing resulting from use of Neomycin unless such treatment was not administered in accordance with acceptable medical standards and techniques. After reviewing the pertinent reported findings during and subsequent to the Veterans Administration hospitalization in April 1968, it is the conclusion of the Board that the evidence does not show negligence, lack of proper care, lack of skill or other indicated fault on the part of this Administration.

FINDINGS OF FACT

1. Mr. Kubrick was placed on Neomycin irrigation by the Veterans Administration during hospitalization in April 1968 for osteomyelitis of the right femur. Beginning in approximately June 1968 defective hearing was noted.

2. Sensorineural deafness was diagnosed during Veterans Administration hospitalization from January to February 1970.

3. There is evidence to show that the defective hearing may have been caused by the Neomycin irrigation.

4. The treatment and care afforded the veteran in connection with the use of Neomycin was administered by duly qualified and trained personnel, in accordance with acceptable medical practices and procedures and negligence, error in judgment or other indicated fault is not shown.

CONCLUSION OF LAW

The defective hearing did not occur under circumstances contemplated by Section 351, Title 38, United States Code.

DECISION

Entitlement to service connection for defective hearing under 38 U.S.C. 351 is not established. The benefit sought on appeal is denied.

/s/ H. J. Schlegel
H. J. SCHLEGEL

/s/ John G. Higgins
JOHN G. HIGGINS, M.D.

/s/ I. Kleinfeld
I. KLEINFELD

[SEAL] VETERANS ADMINISTRATION
OFFICE OF GENERAL COUNSEL
Washington, D.C. 20420

April 13, 1973

IN REPLY
REFER TO:

021
C 17 381 329
KUBRICK, William A.

CERTIFIED MAIL

Mr. Michael I. Luber
Attorney at Law
1420 Walnut Street
11th Floor
Philadelphia, Pennsylvania 19102

Re: Administrative Tort Claim—
William A. Kubrick

Dear Mr. Luber:

This is in reference to the above-captioned administrative tort claim filed with this agency.

A review of the facts and circumstances connected with this case reveals that the claim of Mr. Kubrick was not filed within the two-year statute of limitations provided by section 2401(b) of the Federal Tort Claims Act, 1346(b), 2671, et. seq. Accordingly, this agency is without jurisdiction to consider the claim.

Section 2401(b) provides that a tort claim administratively denied may be presented to a federal district court for judicial consideration. Such suit may be initiated within six months after the date of mailing of the notice

of denial. For purposes of this provision, this letter will constitute a denial of this claim.

Sincerely yours,

/s/ John H. Kerby
JOHN H. KERBY
Assistant General Counsel

BOARD OF VETERANS APPEALS

WASHINGTON, D.C. 20420

Docket No. 75-10 765

Date—July 16, 1975

FINDINGS AND DECISION
(RECONSIDERATION)

IN THE APPEAL OF

WILLIAM A. KUBRICK
C 17 381 329

THE ISSUE

Entitlement to compensation under the provisions of Title 38, Section 351, United States Code, for defective hearing.

REPRESENTATION

Appellant represented by: Paul R. Anapol, Attorney

CONSULTATIONS BY THE BOARD

Roger K. Bauer, Staff Legal Adviser

ACTIONS LEADING TO PRESENT
APPELLATE STATUS

This is a reconsideration of a case in which the issue of entitlement to compensation under the provisions of Title 38, Section 351, United States Code, for defective hearing was previously before the Board, and in a decision dated August 9, 1972, was denied. The decision held the veteran's defective hearing may have been caused by Neomycin irrigation administered during treatment at an Administration medical facility, the treatment and care afforded the veteran was by duly qualified and

trained personnel in accordance with acceptable medical practices and procedures and negligence, error in judgment and other indicated fault were not shown.

CONTENTIONS

The appellant and his attorney contend, in substance, that the veteran was hospitalized at an Administration medical facility during which time he was administered medical care which was negligent and careless in administration and as a result thereof, he sustained a severe and permanent bilateral nerve deafness. It is asserted, in particular, that the drug Neomycin was provided the veteran in such an improper manner as to eventually result in the hearing loss.

THE EVIDENCE

The Board of Veterans Appeals decision dated August 9, 1972, contains a summary of the material evidence pertinent to the claim at that time. Copies of the decision were furnished the interested parties, and that decision is incorporated by reference. The material therein will not be restated or enlarged upon herein except for purposes of clarification.

Additional medical reports have been received which bear upon the issue presented. Joseph Sataloff, M.D., in correspondence to the appellant's attorney dated in September 1971 opined that the veteran had bilateral nerve deafness due to ototoxic drug administration.

Linwood F. Tice, D.Sc., provided the opinion the claimant was furnished a grossly excessive dossage of Neomycin in a manner conducive to systemic absorption. The amount documented as administered was very large for such a hazardous antibiotic.

Thomas Gain, M.D., reported that after a review of the facts, the method of administration of the dosage used of the Neomycin was such that the standard of care required was not adhered to and that the use of the Neomycin resulted in hearing loss.

W. J. Russell Taylor, M.D., Ph.D., reported that the systemic absorption of Neomycin can cause ototoxicity, and that the manner in which the Neomycin was administered to the veteran at the Veterans Administration hospital was such that high systemic absorption could be expected.

Lord Lee-Benner, M.D., reported that the veteran had undergone personality changes following the development of bilateral nerve deafness.

The manager of the RCA facility where the veteran was employed as a machinist reported that the veteran would be terminated from his employment if he did not return to work.

Saul S. Leshner, Ph.D., submitted a statement as to the veteran's loss of earning power as a result of his hearing loss.

THE LAW AND REGULATIONS

The unanimous decision of the members of a section of the Board of Veterans Appeals is final, except that the Board may on its own motion correct an obvious error in the record. (38 U.S.C. 4003, 4004)

Reconsideration of an appellate decision may be afforded by the Board of Veterans Appeals for obvious error of fact or law upon allegation by the claimant or on the Board's own motion. (38 C.F.R. 19.148)

When a decision of the Board is to be reconsidered, the Chairman may assign one or more sections to participate with the members signatory to the decision being reconsidered. (38 C.F.R. 19.152)

When a veteran suffers an injury, or aggravation of an injury, as a result of hospitalization, medical or surgical treatment or examination and such injury or aggravation results in additional disability, compensation may be awarded in the same manner as if such disability were service connected. (38 U.S.C. 351)

Compensation may not be payable for either the usual or unusual results of approved medical care properly

administered, where the evidence does not show that the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment or other instances of indicated fault on the part of the Veterans Administration. (38 C.F.R. 3.358(c)(3))

The effective date of an award based on a finding of clear and unmistakable error in a prior decision will be the date benefits would have been payable if the corrected decision had been made on the date of the revised decision. (38 C.F.R. 3.105, 3.400(k))

DISCUSSION AND EVALUATION

An enlarged panel of two sections of the Board of Veterans Appeals has reviewed the entire evidence of record, including the medical reports, the various expert opinions and the contentions. On the basis of the material available to the Board at the time of the August 1972 decision, a determination was made which involved an element of judgment and opinion. To reverse that decision would require a finding that it was clearly and unmistakably erroneous at the time it was promulgated.

The Board has again reviewed the entire record of evidence. Recently submitted materials are, for the most part, cumulative in nature to those previously considered; however, certain technical points adduced have added perspective to the evidence already of record.

The Board's finding that the veteran's defective hearing may have been caused by the Neomycin irrigation stands and is supported by the evidence. However, a further in-depth review supports the claimant's assertions of improper administration of the drug. The amount utilized was of such quantity, when considered with the size and depth of the wound and the form of drug administration, as to support a finding the procedure deviated from accepted medical practices and procedures, indicating fault on the part of the Veterans Administration based on the data previously on file.

FINDINGS OF FACT

1. Mr. Kubrick was placed on Neomycin irrigation by the Veterans Administration during hospitalization in April 1968 for osteomyelitis of the right femur.

2. Defective hearing was noted in about June 1968 and sensorineural deafness was diagnosed during Veterans Administration hospitalization from January to February 1970.

3. Defective hearing may have been caused by the Neomycin irrigation.

4. The benefit in issue was denied in Board of Veterans Appeals decision promulgated August 9, 1972, which decision now appears to have been erroneous.

5. There was fault on the part of the Veterans Administration in the manner of Neomycin irrigation which is reasonably determined to have resulted in sensorineural hearing loss.

CONCLUSION OF LAW

The prior decision of the Board of Veterans Appeals in August 1972 involved obvious error of fact in denying compensation under the provisions of Title 38, Section 351, United States Code, for defective hearing. (38 U.S.C. 351, 4003, 4004; 38 C.F.R. 3.358, 19.148)

DECISION

Entitlement to compensation for defective hearing under 38 U.S.C. 351 has been established. The appeal is allowed.

/s/ H. J. Schlegel
H. J. SCHLEGEL

/s/ T. H. Wells
T. H. WELLS, M.D.

/s/ I. Kleinfeld
I. KLEINFELD

/s/ Samuel W. Warner
SAMUEL W. WARNER

/s/ P. M. Fiandaca
P. M. FIANDACA, M.D.

/s/ K. J. Wells
K. J. WELLS

[2-72]

TESTIMONY OF WILLIAM A. KUBRICK

* * * *

BY MR. KUBY:

Q I think we last questioned you, Mr. Kubrick, about your being discharged from the Veterans Hospital in Wilkes-Barre at the end of April 1968; is that correct?

A Yes.

Q Now after you were discharged from the hospital, what did you do?

A I went to my family doctor.

Q And was that Dr. Mazaleski?

A Yes, it was.

Q Did you return to work right away? Did you stay home for any period of time?

A I stayed home for about two months before I went back to work.

Q And during the time you were home did you have any trouble with the leg that had been operated upon in the Veterans Hospital?

A No.

Q Did that in fact clear up?

A Yes, it did.

Q When you went back to work for RCA in Dunmore, did you have any trouble with your leg or with your hearing?

[2-73] A No.

Q Did there come a time, Mr. Kubrick, that you began to experience problems with your hearing?

A I started experiencing problems with my hearing in June of '68. Approximately two months after my discharge from the hospital.

THE COURT: What was the exact date of discharge?

MR. KUBY: April 30, 1968.

BY MR. KUBY:

Q Can you tell us what these problems with your hearing were when you first began to have that experience?

A Well, in June was the first time that I had any problem with my hearing. And it started out with a ringing in my ears.

Q Was it a ringing which was there all the time or did it come and go?

A Once it came it stayed.

Q Did it come in both ears at the same time or did it come in one ear before it came to the other?

A It started in my left ear first.

Q And how long did it take before it got to the other ear?

A I would say about a month.

Q Mr. Kubrick, once you began to experience the ringing in your ears were you able to hear conversations?

A Yes, I was.

Q Did there come a time when your ability to hear sounds [2-74] or voices began to be diminished?

A Yes, it was.

Q When did that begin?

A Well, I started getting the loss of the hearing part it must have been about August of '68. It was very slight losing of the voices. They were getting dimmer, less audible.

Q Did you tell anyone about this problem?

A Yes, I went to see Dr. Mazaleski.

Q Did you tell your wife and your family about the problem?

A Yes, I did.

Q About when did you go to see Dr. Mazaleski about the problem?

A In June and July of 1968.

Q Why did you go to him?

A Because he was my family doctor and I went to him to see what was wrong.

Q Why didn't you go back to the Veterans Hospital?

A Why didn't I what?

Q Why didn't you go back to the Veterans Hospital?

A Because the Veterans Hospital released me in his care. So that's why I went.

Q When the ringing began in your ears did you have any idea or thought where it was—what caused it or what it was coming from?

A No.

Q When you went to Mr. Mazaleski what did you tell him?

[2-75] A I told him I was experiencing the ringing in my ears.

Q What, if anything, did he do for you?

A He put purple stuff in my nose and treated. He thought I might have had a cold in my head or a virus and then when that wasn't true then he sent me to an ear specialist.

Q How many times did you see Dr. Mazaleski for the ringing in your ears and your hearing problem?

A The exact number of times, I don't know. I went for two months to see him.

Q Did you ever tell him anything about being hospitalized in the Veterans Hospital in April of 1968?

A Well, when the hospital released be in his car, well, naturally I showed him the scar in my leg.

Q Were you asked by him concerning anything about the treatment you received at the Veterans Hospital?

A No.

Q Did you specifically tell him or were you asked about any drugs that you received in the hospital?

A No.

Q Were you referred by Dr. Mazaleski to any other physician because of your hearing problem?

A Dr. Soma he sent me to.

Q When did Dr. Mazaleski send you to Dr. Soma?

A I believe it was in August of '68.

Q Where were Dr. Soma's offices located?

[2-76] A Scranton, Pennsylvania.

Q Is he a hearing specialist?

A Yes.

Q Did you go to Dr. Soma?

A Did I what?

Q Did you go to Dr. Soma?

A Yes, I did.

Q And was that in 1968, August or thereabouts?
A Yes, I believe it was August.
Q Did you go with anyone? Did anyone go with you, Mr. Kubrick?
A Oh, yes, my wife did.
Q How many times did you see Dr. Soma in 1968?
A Once.
Q What, if anything, did you tell Dr. Soma when you went to see him?
A I just told him I have a loss of hearing.
Q What did Dr. Soma do for you?
A He checked my hearing with earphones for different pitches of tones.
Q Did he do anything else?
A No. He just told me that I had bilateral nerve deafness.
Q Did he question you concerning your hospitalization at the Veterans Hospital in April?
A No, he did not.
[2-77] Q Did he question you concerning any drugs that you may have taken?
A No.
Q Did you tell him about any drugs at that time?
A No.
Q Did he make any recommendations to you at the time of your examination when he told you you had bilateral nerve deafness?
A All he gave me was a prescription to get filled and told me to come back in a month.
Q Did he tell you what bilateral nerve deafness was?
A Well, at the time, no, he just said bilateral nerve deafness.
Q Did you have any conversation with him as to what might have caused it?
A No.
Q Did you ask him?
A No.
Q Did he tell you?
A No.
Q Were you still working?
A Yes, I was.

Q Were you able to do your job as a machinist with your condition as it was in the summer of 1968?
A Yes.
Q Now, did you get any treatment after Dr. Soma or did you [2-78] go back to see Dr. Soma as he suggested?
A No, I did not.
Q Did you go to see any other physician?
A Yes, I went down to Geisinger Medical Center to see Dr. Cole.
Q Geisinger Medical Center is in Danville; is that correct?
A Yes.
Q What made you go to see Dr. Cole?
A Because I just didn't like the opinion of Dr. Soma.
Q Were you referred to Dr. Cole by any doctor or by anyone?
A Yes, I was.
Q By whom?
A By a neighbor.
Q When did you go to see Dr. Cole?
A I believe it was in September.
Q Of 1968?
A Yes.
Q Would you tell us what you told him at the time of your examination?
A I just told him that I was having a hearing loss.
Q Did he take any history from you?
A Yes, he did.
Q Did that history include the hospitalization that you had at the Veterans Hospital in April?
A Yes, it did.
[2-79] Q Did he ask you anything concerning any drugs or medication that you received?
A No.
Q Did you tell him about any drugs or medication that you received?
A No, I did not.
Q What did Dr. Cole do for you or what was his examination?

A He had a technician put me in a room and put earphones in my ears and test me with different tones and talking to me.

Q How long did the examination last?

A Approximately between a half hour to 45 minutes I would say.

Q As a result of the examination did you have any discussions with Dr. Cole as to what your problem was?

A Yes, I did.

Q And what, if anything, did he tell you?

A He told me I had a bilateral nerve deafness and that a hearing aid or surgery would not help me.

MR. HOLL: Objection.

THE COURT: Well, I will overrule the objection, Mr. Holl, because I deem this evidence offered not for hearsay purpose. That is to prove the truth of the matter therein asserted, namely, that he had bilateral nerve deafness. Although I would note parenthetically whatever the ultimate diagnosis is, I don't think there is any dispute about it or I suspect [2-80] there is no dispute about it. But I accept it or I receive it because I don't conceive it as being used for a hearsay purpose but rather on the issue of what Mr. Kubrick knew or didn't. And more precisely as it related to the statute of limitations question.

I take it that is the purpose for all this.

MR. KUBY: That's correct, sir.

BY MR. KUBY:

Q What did Dr. Cole tell you—I think you answered the question, I believe.

THE COURT: I think he said he had bilateral nerve deafness.

BY MR. KUBY:

Q Did Dr. Cole tell you anything concerning what was the cause of it?

A No, he did not.

Q Did you question him?

A No, I did not.

Q About what was the cause.

A No.

Q Did you have any idea about what was the cause of your deafness when you went to see Dr. Cole?

A No.

Q Did you make any arrangements for further treatment with Dr. Cole?

[2-81] A No. He told me to come back in about six months.

Q Did he give you any medicine or suggest anything to you?

A No. He just said I would have to start looking at people directly when I am talking to them or they are talking to me.

Q On the day you left Dr. Cole did you get any other medical treatment?

A After I left Geissinger Medical Center I was disgusted because he said nothing could help me. So I did stop in the Veterans Administration Hospital and Dr. Fischoff, who is the ear and hearing specialist there, did check my hearing. And after the hearing he did give me a prescription to pick up at the pharmacy.

MR. KUBY: I am marking a bottle as P-1.

BY MR. KUBY:

Q Mr. Kubrick, I show you the bottom which has been marked P-1 and ask you if you can identify that bottle.

A Yes, this is a bottle I got from Dr. Fischoff at Wilkes-Barre Veterans Hospital.

Q When you went to see Dr. Fischoff on that day did he do a hearing test?

A Yes, he did.

Q Was the hearing test done in the same hospital where you had been in April of 1968?

A Yes, it was.

Q Do you know whether or not at the time he did the hearing [2-82] test he had your records in front of him?

A Yes, he did.

Q Did he say anything to you concerning the cause of your hearing problem?
A No, he did not.
Q Did he say anything to you concerning any drugs or medication that you had received as being related to your hearing problem?
A No, he did not.
Q Did you question him or ask him what was the cause of your hearing problem?
A No, I did not.
Q Did he ask you to come back?
A No, he did not.
Q What, if anything, did he tell you about the bottle with the liquid in it that he had prescribed for you?
A Well, he sent me down with the prescriptions to the pharmacy to pick it up and start taking it.
MR. HOLL: I object.
THE COURT: Overruled.

BY MR. KUBY:

Q How were you to take it?
A Like it says on the bottle here, twice daily and a glass of water.
Q And that was to be swallowed?
[2-83] A Yes.
Q Did you follow those directions?
A I did for a while.
Q Did it change your hearing situation?
A No, it didn't.
Q What did you next do, Mr. Kubrick, after that day when you went to see Dr. Cole at Geissinger and went to see this doctor at the Veterans Hospital, what did you next do concerning your hearing after that?
A Well, when we were home another neighbor told us about Dr. Sataloff in Philadelphia that was a real specialist in the field. And we got the address and set up an appointment with Dr. Sataloff and we did go to see him. I think it was in October or November. I'm not sure which month.
Q Of 1968?
A Yes.

Q When you went to see Dr. Sataloff what was the condition of your hearing as best you can recall?
A It was getting worse.
Q Could you still hear voices?
A At that time, yes.
Q Can you still hear sounds?
A Yes.
Q Could you hear a telephone ringing?
A No, I don't remember hearing a telephone ringing then.
[2-84] Q Can you hear a telephone ringing now?
A No.
Q Can you hear the siren from an ambulance?
A All it is is noise. I do hear loud sounds and my ears pick it up. And it starts my ears ringing more. But there would be a lot of sound. They come to me as noise.
Q Can you hear the horn of an automobile?
A No. It would be just like a loud sound. You would hear a loud sound but you wouldn't understand it or know what it is.
THE COURT: Are you allowed to drive a car?
MR. KUBY: Yes, he is.

BY MR. KUBY:

Q Are you allowed to drive an automobile?
A Yes.
Q Are there any special precautions taken in your household when you drive an automobile?
A No. When I am driving they don't try to make any noise to disturb me because I am always looking where I am going and looking in the mirror.
Q When you went to see Dr. Sataloff here in Philadelphia did you give him a history?
A I told him I was in the Veterans Administration Hospital. But I couldn't give him a complete history. So he told me he would send for the files in the Veterans Administration Hospital.

[2-85] Q Did you have any discussions with him concerning the medication that was given to you at the Veterans Hospital?

A At that time, no.

Q Did you have any discussions with Dr. Sataloff concerning the cause of your hearing problem?

A At that time, no.

Q Did you undertake a course of treatment with him?

A Yes, I did.

Q What did he do for you? First of all, what did he do for you on that first day?

A He told me on the first day that he was going to send for the hospital records at the Veterans Administration Hospital and then he could give me more clearly what—if there was anything there that could have caused it.

Q Did you then go back to see Dr. Sataloff?

A Yes, I went to see him quite often.

Q Did there come a time with Dr. Sataloff that you had any discussions concerning what might have caused your hearing problem?

A Yes. After he received the hospital records he did discuss with me and did tell me that there was a possibility that the drug neomycin could have caused my hearing loss.

Q Do you know what date that was?

A That was early in 1969. I can't tell the exact month.

Q Do you know whether Dr. Sataloff received the full hospital [2-86] records or only a portion of the hospital records at that time?

MR. HOLL: Objection.

THE COURT: Objection sustained.

BY MR. KUBY:

Q Well, do you know how much of the hospital records the doctor received?

MR. HOLL: Objection.

THE COURT: Objection sustained.

A He told me he received a minimum amount.

MR. HOLL: Could I have that last response stricken?

THE COURT: I didn't hear it. It is stricken.

BY MR. KUBY:

Q Mr. Kubrick, after that conversation what did Dr. Sataloff do for you as far as treatment?

MR. HOLL: Objection as to leading.

A He gave me prescriptions to fill and to take.

THE COURT: Objection overruled.

Ask if he knows what season it was or what month it was when Sataloff told him what he discussed about doing.

BY MR. KUBY:

Q The judge would like to know, Mr. Kubrick, what season or month, if you can detail it, it was in 1969 when the doctor told you about the possibility of I think you said a drug causing your [2-87] hearing problem.

A That it was possible to cause my hearing problem.

Q Do you know what month that was?

A No. I know it was in the early part of '69. It is so far back that the month I can't say right now.

Q When he told you that how did you feel or what did that mean to you?

A Well, I felt depressed because I wanted my hearing cleared up. And he just told me that it could not be and it would get worse. The ringing he said he would try to get rid of that too, which I still have. It has not gone away.

Q When he told you that it was possible that the drug caused your hearing loss, what did that mean to you?

A Just that it was unfortunate the drug was causing my hearing loss. Nothing else.

Q Mr. Kubrick, after this conversation with Dr. Sataloff in which he told you about the possibility, what, if anything, did you do?

A Well, I went down to the Wilkes-Barre Veterans Hospital—not Veterans Hospital, Wilkes-Barre Veterans Building in Wilkes-Barre, Pennsylvania, and went in to see somebody about my hearing. I went to see the re-

ceptionist there which referred me to a DAV Personnel because I was a member of the DAV, that they sent me to him.

THE COURT: By DAV you mean disabled American [2-88] veteran, I take it?

MR. KUBY: That's correct.

BY MR. KUBY:

Q You mean DAV is disabled American veteran?

A Yes.

THE COURT: Mr. Kuby, ask Mr. Kubrick if he can remember Dr. Sataloff's precise words when he told him there was a possibility that the drug neomycin could have caused his hearing loss.

BY MR. KUBY:

Q The judge wants to know what you remember were Dr. Sataloff's precise words when he told you that the drug neomycin could have possibly caused your hearing loss.

A He did tell me that it could possibly be caused by the drug neomycin. That is all.

Q Mr. Kubrick, in 1968 or 1969 did you know what the term malpractice meant?

A Well, to me malpractice I at that time only knew like if somebody took out an organ of a person that that was malpractice.

Q Did you know what the term negligence meant or carelessness?

A I know what the word means. If you walk outside and you hit somebody with a bottle accidentally or something like that, it is negligent on your part like that.

Q When Dr. Sataloff spoke to you in 1969 and told you about the possibility of the drug neomycin causing your hearing loss, [2-89] did he say anything about any carelessness or negligence or malpractice at that time on the part of any doctor?

MR. HOLL: Objection.

A No, he did not.

THE COURT: Overruled.

BY MR. KUBY:

Q Now you say you went into the Veterans Building or Government building in Wilkes-Barre?

A Yes.

Q And for what purpose did you go there?

A To file a claim for service-connected compensation.

Q For what?

A For my loss of hearing.

Q When had you decided to do that?

A That was in April of 1969 I believe it was. That was after Dr. Sataloff told me that there was a possibility.

Q How long after the conversation with Dr. Sataloff did you decide to go and file a claim for Veterans benefits?

A That was about two months, I would say.

Q I show you, Mr. Kubrick, a document which has been marked P-2 entitled Statement in Support of Claim. Is that the claim which you filed?

A I didn't get that.

Q Is that paper a copy of the claim which you filed that day, that you have just described, in Wilkes-Barre? [2-90] A Yes.

Q Can you read that?

A Well, it is hard to read because I did not fill it out. Mr. Dudish filled it out himself. He wrote it and I just signed it.

Q Well, can you read to the best of your ability?

A Please consider this as a supplemental claim for—it looks like bilateral. It is hard for me to read this.

Q Let me read it and see if you agree with me and, Mr. Holl, will you read along with me.

MR. HOLL: I may have a clearer copy.

THE COURT: Gentlemen does it say what it says it says?

MR. HOLL: I would think, Your Honor, the document speaks for itself.

THE COURT: So would I.

BY MR. KUBY:

Q Is that your signature on the document?
A Yes, it is my signature.
THE COURT: Why don't you read it into the record, Mr. Kuby, so long as you and Mr. Holl can agree as to what it says.
MR. HOLL: I think it is perfectly understandable.
THE COURT: If it is legible let's read it into the record.
[2-91] MR. KUBY: Please consider this as a supplemental claim for a bilateral defective hearing condition as the result of medication prescribed during my period of hospitalization at the VAH Wilkes-Barre, Pennsylvania in April 1968. Since my period of hospitalization at the VAH-W-B, Pennsylvania I have been receiving treatment from various physicians and since October 1968 I have been receiving treatment by Dr. Joseph Sataloff, 1721 Pine Street, Philadelphia, Pa., and he is of the opinion that as the result of medication prescribed a resultant hearing condition occurred.
It would be appreciated if your office would write direct to Dr. Joseph Sataloff in further development of my claim and I am sure the doctor will cooperate.
Is that correct, Mr. Holl?
MR. HOLL: Yes, I believe so. Except I think the word prescribed ends with result.
Now, maybe you are right. Yes, what you have read is correct.

BY MR. KUBY:

Q Mr. Kubrick, after this document was filed—
THE COURT: Wait a minute. You better trace the document. It was prepared by the DAV man, what happens to it, and so on.

BY MR. KUBY:

Q This document that is in front of you, P-2, was prepared [2-92] by a Mr. Dudish.
A Yes, it was.

THE COURT: How do you spell Dudish?
MR. KUBY: D-u-d-i-s-h.

BY MR. KUBY:

Q Was it prepared in your presence?
A Yes, it was.
Q And did you read it?
A I tried to read it.
Q Did you sign it?
A Yes, I did.
Q Do you know what happened to that document after you signed it?
A He said he was going to send it to Philadelphia.
MR. HOLL: Objection.
THE COURT: All right. I'll sustain the objection. You can re-ask the question.

BY MR. KUBY:

Q Well, did you do anything with the document?
A No.
THE COURT: I will reverse my ruling on it. He may answer. This may relate to estoppel claims and that kind of thing.

BY MR. KUBY:

Q Mr. Kubrick, do you know what happened to the document after [2-93] you signed it?
A As far as I know it was sent to Philadelphia.
THE COURT: Tell Mr. Kubrick to look at me now.
MR. KUBY: Mr. Kubrick, would you look at the judge.

BY THE COURT:

Q Whose words were used in the form? Were they your words or Mr. Dudish's?
A Some was Mr. Dudish's and some was ours.
Q What did you tell Mr. Dudish?
A I told Mr. Dudish what Dr. Sataloff told me. That it was his opinion the drug neomycin could have possibly caused my hearing loss.

Q Did you tell Mr. Dudish what to write or did he decide what to write based upon what you told him?
A What we told him was the basis we wrote the letter.
Q Who was with you.
A My wife.

BY MR. KUBY:

Q Mr. Kubrick, how did you get to Mr. Dudish?
A Well, I was a member of the DAV. So they told me to go down to the Veterans Administration Building in Wilkes-Barre.
Q And once you got there someone sent you to Mr. Dudish?
A Yes.
Q Were you still working at that time?
[2-94] A Yes, I was.
Q What occurred with your claim?
MR. HOLL: Objection.
MR. KUBY: Wait until I finish the question.

BY MR. KUBY:

Q Mr. Kubrick, do you know what occurred with your claim after it was filed in April of 1969?
A It was denied.
Q How do you know it was denied?
A They sent me a statement of the case.
THE COURT: Don't you have that in evidence?
MR. KUBY: We have all of these things. All of these are Government records.
THE COURT: Why don't you use them seriatim?
MR. KUBY: I think we can stipulate and save time, Mr. Holl, that your document No. 5, which I have marked as P-3, a letter dated August 4, 1969, was an acknowledgement of the receipt of the claim by a Mr. Melidosian. And the next document which you have labeled as No. 6 in your packet which was presented to the Court and I have marked as P-4 was the rejection of the claim dated August 11, 1969.
THE COURT: You have one document there or two?
MR. KUBY: I have two documents.

THE COURT: What was the first one?
[2-95] MR. KUBY: The first one was, if you have your packet there, No. 5.
The next document, which is marked as No. 6 on the bottom, which I have marked as P-4, is the rejection.
THE COURT: They are out of order. I have the August 4th acknowledgement.
MR. HOLL: That's our No. 5 and their No. 3.
THE COURT: Who is the rejection signed by?
MR. KUBY: It is signed by three doctors.
THE COURT: Who is the rejection signed by?
MR. KUBY: It is signed by three doctors.
THE COURT: That is August 11, 1969, report of board action.
MR. KUBY: We have another document which has been marked as P-5, which is not included in that packet, which is a letter from the Veterans Administration Center, Philadelphia, signed by R. J. McCauley, Adjudication Officer, dated December 5, 1969, which is addressed to Mr. Kubrick and which is a disallowance of his claim.

BY MR. KUBY:

Q Mr. Kubrick, I show you this document which has been marked P-5. Do you remember receiving that?
THE COURT: Which is this now?
MR. KUBY: This is the letter from the Veterans Administration which reads as follows:—
THE COURT: Who is it signed by?
MR. KUBY: R. J. McCauley.

[2-96] BY MR. KUBY:

Q Mr. Kubrick, the letter, P-5, states:

> We have carefully reviewed your claim for service connection for defective hearing. It has been determined that your alleged hearing loss is not medicinally or medically attributable to your recent hospitalization at the VA Hospital, Wilkes-Barre, Pennsylvania. Accordingly, your claim is disallowed. You will continue to receive $43 monthly for your back condition.

What did this letter mean to you, Mr. Kubrick?

A To me it meant that the Board of Physicians that had the meeting that made the decision made a mistake. That it was the drug neomycin could have caused my hearing loss.

THE COURT: Let me see the letter that you just read.

(Handing to the Court.)

BY MR. KUBY:

Q Mr. Kubrick, when you received that letter that we have just read, did you also receive this document which has been marked as P-4, the clinical record?

A No.

Q Am I correct, Mr. Kubrick, that when you read this letter you disagreed with this letter?

A Yes, I did.

THE COURT: In what respect?

[2-97] BY MR. KUBY:

Q In what respects did you disagree with it?

A Well, in that letter to me because it was medical personnel that made that decision, I assumed it was in my mind a medical error. That they made a wrong decision. That the neomycin did cause my hearing loss which I was trying to tell them it did and they telling me that it wasn't.

BY THE COURT:

Q Mr. Kuby asked you what the letter meant to you. Now you have told me that you disagreed with the letter; is that right?

A Yes.

Q Now, what did the letter mean to you? What did you understand by this letter? In other words, I am not asking you what your conclusion was as to whether the three documents were right or wrong—Mr. McCauley's letter. I am not asking you whether you thought McCauley was right or wrong but what you understood by his letter.

Now Mr. Kuby will show you the letter again.

A I believe they erred in their decision. They said it could not happen medically. In other words, it was impossible for it to happen to me. And I disagreed with that.

Q But my question is what did you understand them to be saying. What did you understand the letter to mean, not what your conclusion was as to agreeing or disagreeing with it but what [2-98] did you understand the letter to mean?

A That it could not cause my hearing loss.

BY MR. KUBY:

Q Now after you received that letter and you disagreed with it, as you have stated, what did you do?

A Well, we filed an appeal to it.

THE COURT: Ask him who "we" is.

A After we received the statement of the case we filed an appeal to it.

BY MR. KUBY:

Q I don't understand you.

A I believe at that time they did send us a statement of the case concerning it. But we had to answer different questions. I am not sure if that was the time.

MR. KUBY: I am referring to Document No. 3 in that packet, sir, which I have now marked as P-6.

BY MR. KUBY:

Q Mr. Kubrick, on or about September 25, 1969, did you file another document in connection with your claim, and specifically I show you a document marked P-6.

A Yes.

Q Why did you file that?

A This was just a statement in support of the claim that I originally made.

Q Would you read it, please?

[2-99] A Out loud?

Q Yes, sir.

A I received a decision of August 1969 denying service connected for my claim for the loss of my hearing

and the ear condition I now have. I am dissatisfied with this decision and I feel it is unjustified.

On April 2nd, 1969 I was admitted to the Wilkes-Barre Veterans Hospital. I was in severe pain—

* * * *

[4-46]

* * * *

BY MR. KUBY:

Q Mr. Kubrick, the last document that you testified to was a statement that you sent to the Government, dated September 25, 1969, which we had marked as P-6.

Now, did you after that date receive a decision from the Veterans Administration dated September 26, 1969, which we have marked P-13 and which is entitled Statement of the Case in the Appeal of William A. Kubrick from the decision of the Veterans Administration. And I show you—

THE COURT: What was that marked before, Mr. Kuby?

MR. KUBY: That is marked P-13.

THE COURT: What was it before?

MR. KUBY: It is No. 9.

A Yes, I received this letter.

BY MR. KUBY:

Q Mr. Kubrick, did you read it?

A Yes, I did.

Q What did you understand that to mean?

A To me it meant that the drug neomycin could not have [4-47] caused my hearing loss.

Q Mr. Kubrick, I refer to Page 4 of that document, the last sentence in the top paragraph starting "They found." Would you read that to yourself.

A Yes.

Q Did you read that in 1969 when you got that paper?

A Yes, I did.

Q What did that mean to you?

A That there was no malpractice, negligence or any other thing.

Q Had you at that time given any consideration or thought to malpractice, negligence, anything like that?

A No, I did not.

Q You said you knew what it meant or you had some knowledge of what the term might mean?

A Yes.

Q So when you received this document did that sentence mean anything to you in regards to your case?

A I didn't get that.

Q When you received that document in 1969, September of 1969 and when you read it, did that sentence have any meaning to you in connection with your case?

A No.

Q I refer you to the last sentence on Page 6 starting "No carelessness, accident". Read that to yourself.

[4-48] Did you read that in 1969 when you got that document?

A Yes, I did.

Q Did that sentence have any meaning to you?

A No.

Q What was in your mind concerning your hearing loss at that time in September of 1969 when you received that document, what did that whole document mean to you?

A The whole document meant to me that they just could not have caused my hearing loss.

Q The next document is Government's No. 10, our number P-14.

Mr. Kubrick, I show you a document marked P-14 from the Veterans Administration Center, Wissahickon Avenue and Manheim Street, Philadelphia, dated September 29, 1969 addressed to you. Did you receive that letter?

THE COURT: That's the letter from R. J. McCauley, Adjudication officer?

MR. KUBY: Yes, sir.

A Yes, I did.

BY MR. KUBY:

Q What did that letter mean to you?

A That meant to me that I had to fill out a statement of disagreement. As they state down in the next to last paragraph that the important things are to say in your own words what benefit you want, what facts and the statement you disagree with, [4-49] and any error you believe we made in applying the law.

Q The next document is Government's Exhibit No. 13, marked as Plaintiff's 15.

Mr. Kubrick, I show you this paper marked P-15. It is a letter from you to the Veterans Administration to Mr. McCaulay. Is that letter in reply to the other letter?

A Yes, it is.

MR. KUBY: We will speed this up, if Your Honor please.

BY MR. KUBY:

Q P-16 is Government's No. 14 and it is a letter which the Government answered your letter and said you had more time to file your appeal; is that correct?

A Yes, it is.

Q Now that last letter was dated November 10, 1969.

A Yes.

Q Now, did you thereafter write to your State Senators, the Senators of Pennsylvania, Senator Schweiker and Senator Scott concerning your problem?

A Yes, I did.

MR. HOLL: Objection, Your Honor. First of all, the question is leading; and, secondly, Senators Schweiker and Scott are United States Senators.

MR. KUBY: I will accept that if I was unclear.

BY MR. KUBY:

[4-50] Q Government's No. 15, our number P-17, I show you that document, a copy of a letter to Senator Schweiker. Would you look at that, Mr. Kubrick. Look at the second page, sir. Is that your signature?

A Yes, it is.

Q Who typed the letter?

A My wife typed the letter.

Q Did you read the letter before she typed it?

A Yes, I did.

Q Now would you in your own words explain to His Honor what you mean by sending the letter? What did you intend to accomplish by sending the letter?

A Trying to get help from them to talk to the Veterans Administration which caused my nerve deafness which I believe was caused by the drug neomycin and I wanted to get a fair decision from them.

Q Specifically, Mr. Kubrick, I refer you to the paragraph on the second page "To sum it all up". Would you read that aloud.

A To sum it all up I have spent a fortune on medical help, drugs, transportation, hotel bills and loss of work all at my own expense and now even face losing my job because I am a hazard being deaf, with a bad back and legs. All this through no fault of my own.

Q What did you mean by that?

A Well, by that I meant that it was no fault of my own because [4-51] the drug neomycin had caused my hearing loss.

Q Did you in your mind believe at that time or had any suspicion at that time concerning the item of malpractice or negligence or carelessness?

A No.

Q In December of 1969, Mr. Kubrick, when you wrote that letter had you discussed the issue of malpractice or negligence or carelessness by the doctors in the VA hospital with any lawyer?

A No.

Q With any doctor?

A No.

Q Had that fact ever come across your mind at that time?

A No, it did not.

Q Did any doctor or lawyer ever discuss it with you, the issue of malpractice at that time?

A No, not at that time, no.

Q Mr. Kubrick, I refer you to the next to the last paragraph in that letter which says "With all these facts." Would you read that aloud and tell the Court what you meant by that.

A With all these facts, and still being turned down by the VA Administration who maintain their hospitals are not capable of error or misjudgment you can see now why I desperately seek your help when applying for financial assistance.

Q What did you mean by that?

A By their decision that the drug neomycin could not cause [4-52] my hearing loss.

Q Did you mean that in any context or with any relationship to malpractice or negligence?

A No, I did not.

Q Did anyone at the VA ever, up to that time, discuss the issue of malpractice or negligence with you?

A No.

Q Were you ever told what to do if you thought there was malpractice or negligence?

A No.

Q The next document is not in the packet of Government documents. It is marked P-18. It is a similar letter addressed to the Honorable Hugh Scott.

THE COURT: Is that the same? Do you stipulate the testimony would be the same about Senator Scott?

MR. HOLL: The Government has seen that letter and we stipulate the testimony would be essentially the same.

BY MR. KUBY:

Q Now, did you get any replies from these two United States Senators?

A Yes, we did.

Q What were the replies?

A That the drug neomycin could not have caused my hearing loss because the Veterans informed them that it couldn't and that is what they wrote me back.

[4-53] Q Now in the end of 1969 were you still trying to prove what caused your hearing loss?

A Yes, I was.

Q Did you or your wife on your behalf write to the Department of Health, Education and Welfare?

A Yes, my wife did.

Q The next document is Government 16, Plaintiff's Exhibit 19.

MR. KUBY: Can we stipulate that this is a reply from the Department of Health, Education and Welfare?

MR. HOLL: Certainly.

MR. KUBY: Dated December 30, 1969.

I think we can stipulate concerning Government Document No. 18, which we have labeled as Plaintiff's Exhibit 20, is another document to show the attempt by the Kubricks to establish a cause and effect relationship between the drug and the hearing loss. This is a letter from Dr. Schuknecht of the Massachusetts Eye and Ear Infirmary in Boston affiliated with the Harvard Medical School directed to Mr. Kubrick. Is that correct, Mr. Holl, can we so stipulate?

MR. HOLL: Yes.

BY MR. KUBY:

Q Mr. Kubrick, the document marked 18, was that received by you in reply to a letter sent to this doctor in Massachusetts?

A Yes, it was.

[4-54] Q Now, why did you write to him?

A To try to find out if the drug neomycin could have caused my hearing loss.

BY THE COURT:

Q Mr. Kubrick, when did you first discuss with Dr. Sataloff this problem?

A About my hearing loss?

Q Yes.

A I believe it was in October or November of '68.

Q Now, what, as you best recall, best can recall, did Dr. Sataloff tell you?

A Dr. Sataloff at that time didn't tell me anything that caused my hearing loss until he got the records from the Veterans Administration.

Q And then what did he say?

A He said there was a possibility that is what caused my hearing loss.

Q Did he tell you what his opinion was that it did or that it didn't or did he simply use the word possibility?

A He used possibility all along.

Q Did Dr. Sataloff ever say anything to you back in '68 or '69 about whether they should have treated you with neomycin?

A No, he never did.

Q Did he ever express an opinion to you as to whether they gave you the proper dosage of neomycin or did not give you the [4-55] proper dosage of neomycin?

A No, he did not.

Q Did he ever express an opinion to you as to whether the doctors at the Wilkes-Barre Veterans Administration Hospital treated you properly or did not treat you properly?

A No, he did not.

Q Did you ever ask him about those questions?

A We only asked him if the drug neomycin could have caused my hearing loss. He said it was a possibility. And that's all they ever told me.

THE COURT: Go ahead, Mr. Kuby.

BY MR. KUBY:

Q The next document, sir, is Government's No. 17, Plaintiff's No. 21.

Mr. Kubrick, I show you this document marked P-21 and ask you whether or not that is the form of appeal that was filed to the Veterans Administration from the denial of your claim for hearing loss?

A Yes, it is.

BY THE COURT:

Q When you were filing these claims with the Veterans Administration, and I am referring you now to '69 and we have been talking mostly about 1969 when Mr. Dudish was writing letters and when you were writing letters to Senator Schweiker and Senator Scott, and so on, did you believe that the Veterans [4-56] Administration Hospital doctors had treated your case improperly?

A No, I did not. I didn't ask anybody or have it in my mind at all.

Q Was it your belief that if the drug neomycin in fact caused your hearing loss that the Veterans Administration or the Government was liable to you whether or not somebody was at fault in their treatment of you or didn't you think about that?

A I didn't get all that off you, Judge.

Q You filed these claims and appeals?

A Yes.

Q Because you suspected that the drug neomycin was responsible for your hearing loss; is that correct?

A That the drug neomycin, yes.

Q Now assuming that the drug neomycin had caused your hearing loss, what was the basis on which you believed back in 1969 that the Government was liable to you or that the Veterans Administration was liable to you?

A Well, at that time just like when I was in the service and I got hurt it wasn't my fault and it wasn't the Government's fault but I did get compensation for my back condition and I assume it was the same condition now. It wasn't their fault and it wasn't my fault. And I was entitled to it because I lost my hearing because of the drug neomycin.

THE COURT: Very well.

[4-57] BY MR. KUBY:

Q Mr. Kubrick, in this appeal which runs for six pages, who typed it?

A My wife did.

Q Did you read it?

A I glanced through it.

Q Did you sign it?

A Yes, I did.

Q Is there anything in this appeal form of six pages which is signed by you in which you express any thought of negligence or carelessness or malpractice against the Government?

A No.

Q But what was your dispute with the Government in your mind at that time?

A That I was saying that the drug neomycin could have caused my hearing loss and they said it could not have caused my hearing loss and I didn't know for sure whether it really did.

Q And that for the record was filed December 29, 1969?

A Yes.

Q The next document is Government's 19, Plaintiff's 22.

This is a document received from the Veterans Administration from Mr. McCauley, dated February 16, acknowledging receipt of that appeal form; isn't that correct?

A Yes.

Q And the next document after that is Government's 26, [4-58] Plaintiff's 23, notifying you of a hearing date; isn't that correct?

A Yes, that's correct.

THE COURT: Mr. Kuby, don't all these documents speak for themselves? Why can't we just stipulate that they were filed where indicated, letters where written where indicated, acknowledged where indicated.

MR. KUBY: Then the next document hopefully—

THE COURT: There is no objection to the introduction of any of these, is there, Mr. Holl?

MR. HOLL: No, Your Honor.

MR. KUBY: The next document is Government's 27, Plaintiff's 24, a letter dated September 10, 1970 from a Mr. James W. Stancil of the Board of Veterans Appeal to the Mr. Kubrick advising him of the decision in his case on the appeal. And the document attached to that was Government's 28, Plaintiff's 25, which was a copy of the opinion rejecting the appeal.

BY MR. KUBY:

Q Now as of that date, Mr. Kubrick, September 10, 1970, when your appeal was denied, did you have any change of opinion or change of knowledge concerning the issues that the judge had asked you about and I

have asked you about as to whether or not there was any feeling of malpractice or negligence or carelessness in what the doctors did for you at the hospital.

MR. HOLL: Objected to as leading, Your Honor.

[4-59] A No, I didn't have any cause.

THE COURT: Overruled.

MR. KUBY: I would next mark for identification Government's 29, Plaintiff's 26, which is the transcript of the hearing before the Board of Veterans Appeals.

* * *

[4-60] MR. KUBY: I would offer to introduce and move into evidence the following additional documents.

Government's 31, which I will label as Plaintiff's 27. That is a letter from the Veterans Administration dated October 5, 1970 directed to Mr. Kubrick.

The next document is a letter from the Veterans Administration to Mr. Kubrick, No. 32, Plaintiff's 28, dated October 8, 1970.

The next letter, Government's 35, Plaintiff's 29, [4-61] a letter addressed by Mr. Kubrick to Mr. Johnson, Director of VA affairs, dated October 15, 1970.

BY MR. KUBY:

Q Mr. Kubrick, in connection with that letter it is stated at the top of the third paragraph:

> "Mr. Johnson, if I sound like too much of a Pessimist as to your text in your letter hinted to, Please keep in mind I already have gone through much, when I lost my Hearing as the result of a Medical Error, whether or not the Veterans Administration cares to recognize the truth even after being presented with evidence from the most competent sources."

What did you mean by that?

A Well, when we was at the hearing in July of '70 I told the Board I believe my hearing loss was caused by neomycin. And they made the decision that it could not caused my hearing loss.

THE COURT: Ask him what he meant by the term medical error.

MR. KUBY: I think he is explaining that.

BY MR. KUBY:

Q The judge wants to know what did you mean by the term medical error in that context.

A In that letter we meant that when the Board of Physicians made a decision that the drug could not have caused my hearing [4-62] loss, that is what I call a medical error because the Board members said it couldn't happen.

Q Did you mean anything by that concerning any carelessness, any negligence, any malpractice done to you in April of 1969 at the Veterans Hospital?

A No.

THE COURT: We don't have the letter to Mr. Agnew. He wrote to the vice president somewhere along the line.

MR. KUBY: Apparently we don't have that, sir.

MR. HOLL: I suppose I have that somewhere, Your Honor.

THE COURT: It is certainly of no probative value if it doesn't say anything different from the other letters to Senator Scott, et cetera.

MR. KUBY: The next document is Government's 36, Plaintiff's 30, a letter from Mr. Kubrick to James Stancil, Board of Veterans Appeal, dated October 21, 1970.

The next document is Government's 37, Plaintiff's 31, dated October 27, 1970 from Mr. Kubrick to Mr. Clayman of the Veterans Administration here in Philadelphia.

THE COURT: Let me see counsel at side bar.

(Discussion off the record.)

(Luncheon recess taken at 12:15 P.M. until 1:45 P.M.)

[4-63] AFTERNOON SESSION

WILLIAM KUBRICK, resumed.

THE COURT: Go ahead, Mr. Kuby.

MR. KUBY: If Your Honor please, counsel for the plaintiff and for the Government have agreed to the

stipulated entry into the record of a number of documents which have been marked P-27 to P-51 inclusive. Would Your Honor wish a listing of those with the comparative other numbers or would that be sufficient?

THE COURT: I will read them.

MR. KUBY: Now I would like to make reference to some of them in examination.

I make a reference to P-29, which is the Government's 35. I think it may have been previously identified. It is the letter to Donald Johnson, Administrator of VA Affairs, dated October 15, 1970.

DIRECT EXAMINATION (CONTINUED)

BY MR. KUBY:

Q I would ask you, Mr. Kubrick, to explain what you meant by the middle paragraph on Page 2. You can read it out loud.

A According to recent news media I see I am not alone with my problems or opinions and I am aware of your opinion as given to top agency officials that conditions and criticisms of VA medical facilities are exaggerated and unwarranted especially those presented by Life Magazine. All I care to say in the matter, I suffered the consequences of an error, told the truth, [4-64] produced sufficient reputable evidence and then suffer further because someone does not feel they can admit the truth of making a mistake.

Q What did you mean by that? Would you explain to His Honor what you meant by that?

A By that I mean the Board of Physicians had made an error in the decision of the drug and the suffering I was going through was that my hearing, the ringing in my ears was driving me halfway out of my mind. And consequently I was afraid of losing my job. I wanted to try to keep it.

Q You a number of times used the term in this document and in previous documents of the phrase medical error.

Now when you used that term what did you mean?

A I meant that the Board of Physicians had made the decision that the drug neomycin could not have caused my hearing loss. That is the only thing I meant in them letters.

Q Did you mean anything concerning carelessness or negligence or malpractice in the giving of the drug to you in the first place or in the amount of drug that was given?

A No, I did not.

Q Did you have any inkling at that time that there was something wrong in the way the drug was given to you or in the amount of the drug being given to you?

A No.

Q Now the last sentence in the third paragraph starting [4-65] "Perhaps". Would you read that into the record, please.

A Perhaps you recommend me to a hospital or doctors capable of correcting this error.

Q Again, what did you mean by that term "error"?

A I meant that term error sending me to all different places to get information and try to find a hospital or a doctor that would say the hearing was caused by neomycin, to sort of try to convince the Veterans Administration that it was possible.

Q Just read the last sentence again.

A Perhaps you recommend me to a hospital or doctor capable of correcting this error.

Q Did the Government ever reply to that last request?

A No, they did not.

Q I refer to plaintiff's exhibit 31, which is Government's 37.

I would like you just to read for the record the five small paragraphs which are on the second page which I think are important in establishing your frame of mind.

A I do believe your office will be receiving further evidence of the fact that, I had normal good hearing before this drug had been administered, without using proper precautions. I would appreciate this new evidence being placed on file along with other evidence.

I cannot see the benefit of time delays. The truth is the truth now, tomorrow and thereafter. I believe [4-66]

I have been most patient, especially considering what I have lost, and it is I and my family that have been doing the paying, healthwise and financial.

I have been patient because I am an American and served my country to preserve freedom and to insure liberty and justice for all. I am aware of the problems facing our great land, though I have suffered much, preferred being tolerant rather than give undesirables more reason for creating disturbances and fault finding. It is now this justice I seek one way or another.

Though I have lost much I have gained something, wisdom. God help a needy veteran, who looks to others to assist him, may he look after his own affairs and God bless him if he cannot.

I have discussed my feelings and the facts, truthfully and frankly, I am confident you will accept such in good faith and understanding. If you have any further questions or desire additional proof or feel a personal visit might clarify matters, I will be in Philadelphia on November 19, and would be most happy to discuss matters. Please advise.

Q What did you mean by all of that?

THE COURT: By all of that? Ask him what he meant by saying that he had good normal hearing before this drug had been administered without using proper precaution.

[4-67] BY MR. KUBY:

Q Now what did you mean I had good normal hearing?

A I had good normal hearing before the drug had been administered without using proper precautions. Good hearing would prove we sent for records to the people that had the records in the Army Depot about my hearing. And that proved I had good hearing.

Q What did you mean by the term without using proper precautions?

A I referred that the drug could have caused my hearing loss. That's all.

Q Is that what you meant by that phrase?

A Yes.

BY THE COURT:

Q What did you mean by proper precautions? You said that the drug was administered without using proper precautions. What did you mean by that?

A I don't know.

Q Who composed this letter?

A My wife did. She composed all of my letters.

THE COURT: Go ahead.

BY MR. KUBY:

Q Now, Mr. Kubrick, did there come a time in 1971 that you spoke to Dr. Soma about your situation?

A Yes, there was.

[6-68] Q What was the situation or what was the circumstance of your seeing Dr. Soma in 1971?

A I went to see Dr. Soma after we got a statement from the Government that Dr. Soma said that my hearing loss was the fault of an acoustic trauma and we went to see Dr. Soma to ask him if he said that.

Q When in 1971 was that?

A In June, 1971.

Q Did you have any conversation with Dr. Soma at that time?

A Yes, we did.

Q What did Dr. Soma tell you, if anything, concerning your condition?

A He told me that the drug neomycin caused my hearing loss.

Q What, if anything, did he tell you concerning the action of the doctors at the Veterans Administration Hospital in Wilkes-Barre concerning the giving of neomycin to you?

A He said that they shouldn't have given it to me.

Q Was that the first time that any doctor—

THE COURT: A leading question, Mr. Kuby.

BY MR. KUBY:

Q Had you ever been told that before?

A No.

Q By anybody?

A No.

Q What did you do after that?

[4-69] A We left and my wife composed a letter and we sent it to the Veterans Administration.

Q I show you a letter—this is not within the Government's catalog of documents, sir, for some reason—marked P-39. I ask you, Mr. Kubrick, is this five-page letter the letter that you have indicated was sent to the Government after your meeting with Dr. Soma?

A Yes, it is.

Q Did you have an opinion at that time or did you have a feeling at that time concerning whether or not the Government had committed negligence or carelessness upon you?

A Dr. Soma said that they shouldn't have given me the drug. So I figured they shouldn't have given me the drug.

Q Had you ever had that feeling before?

A No.

Q And why had you not had that feeling before?

MR. HOLL: Objection, Your Honor.

THE COURT: Overruled.

BY MR. KUBY:

Q Why had you not had that feeling about the Government before?

A Because I never knew that the drug really did it for a fact.

Q Well, Dr. Soma told you more than just that the Government did it?

[4-70] A Oh, yes. He showed us in his text he had. I believe it was the PDR, he let us read it in his office and after reading that and after what he told us we figured that it wasn't what the Government had been saying all along.

Q I show you Page 4 and ask you to read the first paragraph.

A Documentary instruction, taken from medical reference text, clearly gave instruction for the proper usage, precautions and procedures to emply as precautionary measures to be followed in the use of the drug neomycin, this included an audio test given before, during, and after the use of neomycin. If this is done the damage would

have been detected in the early stage and drug discontinued before damage became extensive. This procedure was not followed, thus there is evidence of carelessness, lack of medical knowledge, negligence, error in judgment and malpractice, on the part of the staff at the Wilkes-Barre Veterans Administration Hospital.

THE COURT: What was that he was reading from?

MR. KUBY: That is the letter he sent to the Veterans Administration dated July 14, 1971.

THE COURT: Is this an exhibit, one of the Government's exhibits?

MR. KUBY: No, sir. For some reason they didn't put it in.

THE COURT: What number is this now?

[4-71] MR. KUBY: P-39.

THE COURT: What is the date of that?

MR. KUBY: July 14, 1971.

BY MR. KUBY:

Q Now I refer you to page 5, Mr. Kubrick, under Summary of Proof No. 6. Would you read that.

A Proof, that the veteran received this drug improperly, at the VA Hospital. Proper precautions ignored.

Q Mr. Kubrick, did you see Dr. Sataloff in the summer of 1971?

A Yes, I did.

Q Was that after you saw Dr. Soma and had the conversation with Dr. Soma that you have just related?

A Yes, it was.

Q Did Dr. Sataloff discuss with you the use of the drug neomycin?

A No, he did not. I mentioned to him what Dr. Soma said but he didn't discuss the drug.

Q Did he discuss with you anything concerning the treatment that you had gotten at the Veterans Hospital?

A At that time, no.

Q Did you subsequently retain a lawyer?

A Yes, I did.

Q How did you get to a lawyer?

A Well, when I was in Dr. Sataloff's office and I told him [4-72] what Dr. Soma said, he said we better see a

lawyer. And then he asked if we had a lawyer. And we told him no. And we asked him if he could possibly know of a good one. And then he mentioned Attorney Sagot to go and see.

Q Did he tell you why he was suggesting that you see a lawyer?

A No. He just told me I better get a lawyer.

Q What did you understand, Mr. Kubrick, from his suggestion that you go see a lawyer?

A At that time I just didn't know what he had meant exactly by it. But he must have had something in his mind.

Q Did you go to see Mr. Sagot?

A I went to see Mr. Sagot but I didn't see him at all because his assistant attorney Anapol was handling the case for him.

THE COURT: Would you establish the date he went to see Sataloff and Sagot or Anapol?

BY MR. KUBY:

Q Can you be specific to the best of your recollection, Mr. Kubrick, as to when you saw Dr. Sataloff in 1971 on the occasion he suggested a lawyer?

A I believe that was in July.

Q Was that before or after you saw Dr. Soma?

A That was after I saw Dr. Soma.

Q Can you be specific as to the first time that you saw the lawyer, Mr. Anapol?

[4-73] A The first time I seen the lawyer was July 10th, I believe it was. Somewhere around there.

Q I am referring to Government Document 49, which is Plaintiff's 38.

Mr. Kubrick, I show you a letter dated July 31, 1971, from you to the Veterans Administration.

A This is the letter that Attorney Anapol told me to send to take power of attorney from the VFW who had power of attorney for me.

Q I refer to Government Document 50, which is Plaintiff's Exhibit 40. Did you write another letter dated August 30, 1972 advising the Veterans Administration that you retained Mr. Anapol?

A Yes.

THE COURT: Does that cover that phase? Why don't you finish a phase and, I take it, this gentleman is Dr. Benner. You might as well put him on.

BY MR. KUBY:

Q Just in conclusion, Mr. Kubrick, at any time before you spoke to Dr. Soma in the summer of 1971 did you have any inkling, any feeling or any opinion on your own or whether or not it was received from anybody else that the Government through its doctors in the Veterans Hospital had been careless or negligent or guilty of malpractice in giving you the neomycin?

A No.

BY THE COURT:

[4-74] Q On that subject. You had seen Dr. Soma before the summer of '71 hadn't you?

A He gave me a hearing test in '68.

Q And had you seen him between?

A No.

Q Well, how did Dr. Soma come to give you the opinion that he did? Did you have him review records or did you just go to him again in the summer of '71 or was there some advance notice to him that you were coming and did he search out certain records?

A We got from the Government a statement telling me that Dr. Soma told the VA man there that my hearing loss was acoustic tremor. So we took that letter in June to show Dr. Soma is what he meant. And then at that time was the first time I told him I did receive neomycin.

He told me he never told the Veterans Administration man what they said in the letters that he wrote. That they really was like gestapo agents. They tried to put tape recorders on his desk and everything else.

So we went to see him and that is when he told me about they should not have used it.

BY MR. KUBY:

Q Government Document 47, which is Plaintiff's Exhibit 36.

Mr. Kubrick, I show you an exhibit marked P-36. It is a letter from Dr. Joseph Soma to the Veterans Administration, [4-75] Mr. Tallen, dated June 8, 1971. Was a copy of this letter sent to you?

A Yes, there was.

Q Do you know if this letter was sent before or after you met with Dr. Soma in 1971 and had the conversation that you told Judge Becker about.

A It was sent before then.

Q This letter that was sent by Dr. Soma to Mr. Tallen of the Veterans Administration was sent, if you know, before or after your meeting with Dr. Soma?

A It couldn't have been sent before the meeting with Dr. Soma because he seen us about a week before that.

* * *

[4-106] BY MR. KUBY:

Q Mr. Kubrick, I would like to go back to these letters [4-107] that were written around October of 1970 and to have you clarify certain things for me.

Specifically I direct your attention to P-29, which is Government's 35.

The first page and I would ask you to—well, we will make it fast.

You just read the first sentence starting "Mr. Johnson".

A Mr. Johnson if I sound like too much of a pessimist as your text in your letter hinted to please keep in mind I already have gone through much when I lost my hearing as the result of a medical error, whether or not the Veterans Administration cares to recognize the truth even after being presented with evidence from the most competent sources. When offered this evidence the original reason for denial was dropped and a new idea was introduced by the Board members, that of the possibility of having a hearing problem prior to the hospital stay of April 1968. Upon hearing this new theory I spontaneously offered sources where information could be obtained to disprove this new theory. I did sign papers authorizing them to do so. I have sent for my own copies of this information to Tobyhanna Army Depot where I had been employed prior to this misfortune, where a routine record of audio tests given there, prove I had good hearing prior

to [4-108] this hospitalization. I sent for these papers last July when I returned from Washington, and received them within a week. I was informed by the VA District Office in Philadelphia, October 8, when I stopped in while en route to my monthly visit to Dr. Joseph Sataloff, they had just sent for this evidence that day. I can only comment two and one-half years is not much time, except for the one bearing the burden.

Q Now when you used the term "medical error" in that paragraph, what did you mean?

A That was referring to the board of physicians that was there because the only evidence I told them is the evidence contained in that ototoxic drug containing neomycin was possible to cause my hearing loss.

Q You say later on they changed their theories. What did you mean by that?

A Well, they brought up at that hearing that possibly I had lost my hearing before I entered the hospital. And that is the theory I was trying to disprove. So that is why we had them reroute it back to Philadelphia to get all of the medical records and the previous employment. That they can be proven I did not have this hearing loss before.

Q Now that was October 15, 1970. Then the next document is P-30, which is Government's 36. Six days later you sent another letter to the Veterans Administration to Mr. Stancil. [4-109] That speaks for itself. I am asking you in between this letter of October 15 and the letter of October 21, 1970, did you review this case with any doctor or lawyer who might give you any further information?

A No.

Q So you were acting on the same information you had before?

A Yes.

Q Now that letter of October 21 is in reply to a letter from the Board of Veterans Appeals which we have marked as P-30-A. It is not included in the Government's packet. Would you read that letter which you received. It is from James Stancil. It is from the Board of Veterans Appeals and dated October 19, 1970.

A I noticed from your recent letter to the vice president that you expressed a belief that your defective hearing had resulted from medication administered to you while hospitalized for your back condition at the Wilkes-Barre Veterans Administration Hospital in April, 1968. This raises an issue that was not before the Board when your appeal was considered in September.

Accordingly, I have contacted the Veterans Administration Center, Philadelphia and have asked that facility to obtain the complete record of your period of hospitalization in 1968 for the purpose of determining whether you are entitled to disability compensation for the hearing loss under the provisions of 38 United States [4-110] Code 351.

The Philadelphia Center will notify you of the results of the adjudication on this issue. You will also be advised of your appeal rights if the decision is not favorable to you.

THE COURT: What number is that?

MR. KUBY: It is Plaintiff's Exhibit 30-A.

BY MR. KUBY:

Q Now your reply was dated October 21, 1970.

By the way, this letter of October 19, did that say anything about filing a Form 95?

A No, it did not.

Q Had you ever heard of a Form 95?

A No, I did not.

Q Had anyone from the Veterans Administration ever told you about a Form 95?

A No.

Q Now your reply to that letter as I indicated was October 21, 1970. Now six days later you sent this letter to Mr. Clayman at the Veterans Administration in Philadelphia. You testified about that before. That is P-31, it is Government 37.

A This letter here I did not read. I think I answered in a deposition that I had but I did not read this letter.

THE COURT: Which letter is this?

MR. KUBY: P-31.

[4-111] THE COURT: Who signed the letter?

BY MR. KUBY:

Q It is signed by you, is it not?
A Yes.
Q You say you didn't read it?
A No.
Q I ask you whether or not between the time you sent the letter six days before, October 21, 1970, and the date you sent—or this letter was typed October 27, 1970. If you had conferred with any doctor or lawyer or any person that gave you any information concerning whether or not what was done for you in the hospital by any of the VA doctors was wrong, was careless, was done because of malpractice?
A No.
Q Now that particular paragraph that His Honor questioned you about where it says—and I'll read it. It says:

> I do believe your office will be receiving further evidence of the fact that, I had normal good hearing before this drug had been administered, without using proper precautions. I would appreciate this new evidence being placed on file along with other evidence.

Now down at the bottom there is a P.S. and it states:

> The new evidence I refer to above, are sworn testimonies from reputable persons, who know and are willing [4-112] to testify to the facts.

That is what it says. Did I read it correctly?
A Yes.
Q Now I would refer to document Government's Exhibit—
THE COURT: It is his testimony that the letter which says proper precautions he never read?
MR. KUBY: That's right.

BY MR. KUBY:

Q You signed that letter?
A Yes, I did.

THE COURT: Do you have how far he went in school and how far his wife went in school?
MR. KUBY: Yes, he went to the twelfth grade, I believe.
MR. KUBY: I would make reference to the Court to Government Document 45 and Plaintiff's Exhibit 35 and the notation on Page 3 of documents apparently received by the United States Government. And I would make note of the date of October 29, 1970 and certain statements that were received apparently by the Government which were, I submit, the new evidence referred to in the prior—
THE COURT: Mr. Kuby, you can't testify. I will strike that from the record.

BY MR. KUBY:

Q Do you know, Mr. Kubrick, when the new evidence was that [4-113] was submitted with this letter of October 27, 1970?
A This new evidence as far as I can remember, because I didn't read the letter, was different people that sent letters in stating that my hearing—
Q Was one of them J. Fred Parkin?
A Yes, a minister.
Q Was another one William F. Demming?
A Yes.
Q Who is he?
A He was in the Tall Cedars.
Q What is the Tall Cedars?
A It is a fraternity.
Q Did these men ever talk to you or give you any information as to whether or not what was done for you in the hospital was careless or negligent?
A No.
Q When you went to see your first counsel, Mr. Anapol, did you turn over to him all of the documents which you had had up to that time?
A Yes, I did.
Q Did that include the letters sent by you, copies of letters sent by you?
A We took the originals to him and he made copies.

Q Did that include copies of letters that were received from the Government?

[4-114] A Yes.

Q And copies of decisions up to that time?

A Yes.

Q Did Mr. Anapol continue with the administration appeal?

A Yes.

Q To a point that in July 16, 1975, the administrative appeal with the Board of Veterans Appeals was changed and you were awarded a service connected—

THE COURT: Can't we agree on what he got?

MR. KUBY: They don't use the language. The conclusion of law is the prior decision of the Board of Veterans Appeals in August of 1972 involved obvious error of fact in denying compensation under the provisions of Title 38, Section 351, United States Code for defective hearing.

BY MR. KUBY:

Q And that was obtained for you?

A Yes.

Q Up until the time you retained counsel in the summer of 1971 were you advised at any time by anyone in the Veterans Administration offices that you went to or people that you spoke to about the necessity of filing a Form 95?

A No.

Q In any of the documents which were received by you and read by you which stated anything concerning negligence or carelessness or malpractice, was there any inclusion in any of [4-115] those letters of any Form 95 for you to fill out?

A No.

Q Did you after you retained Mr. Anapol as your lawyer have occasion to go to any Government facility to secure a Form 95?

A Yes, he mentioned to us to see if we could get one.

Q When was that?

A In the fall of 1972 I believe it was.

Q Did you go to try to get one?

A Yes, I did.

Q Where did you go?

A I went to a VA contact man in Allentown and asked him if there were any forms that you could file against the Government for malpractice.

Q What did he reply?

A He said he knew of no forms.

Q Did he give you anything in writing?

A Yes, he did.

Q I show you a document which is marked P-50, which is Government's 64, and is that a copy of the document that you received from the Veterans' employee in 1972?

A Yes, it is.

Q Did you ask him at that time specifically for a Form 95?

A We mentioned a Form 95—

THE COURT: Mr. Kuby, try to ask non-leading [4-116] questions.

BY MR. KUBY:

Q What did you ask him for?

A A Form 95 which you file for malpractice like Attorney Anapol told us to look for.

Q Mr. Kubrick, after you went to the hospital in April of 1968 and had the operation did you return to work for RCA?

A Yes, I did.

Q How long did you work for RCA after that?

A Until January of 1970.

Q Can you tell His Honor how you were able to work as long as you did with your hearing problem?

A Well, I worked on the third shift and they wasn't the full capacity of people that was on the day shift and the second shift. That the fellow workers they covered up so I could keep my job. They kept it away from the foremen.

Q In connection with your job was it necessary for you to be able to hear?

A Yes.

Q Why did you finally stop your work?
A Well, in January of 1970 the VA said they wanted to put me into the hospital to re-X-ray my leg. So when they sent me in to re-X-ray my leg they said there was nothing wrong with it. So they kept me in the rest of the month and they checked my back and gave me physical therapy.

* * *

[4-124] Q Do you have any social life with your wife now?
A No.
Q Why not?
A I just don't feel like going to them.
Q Do you eat with the family now?
A No. I sort of let them eat first and then I go and eat by myself.
Q Why?
A I want to be alone, I guess.
Q Did you ever do that before your hearing was lost?
A No, we used to always eat together.
Q Do you stay by yourself a lot?
A Yes, I do.
Q Why?
A Because I want to be alone.
Q Do you have any reason?
A Well, I just always seem depressed and I just want to be by myself.
Q Before your loss of hearing did you stay by yourself a great deal?
A No.
Q Mr. Kubrick, when was the first time that you thought that your hearing problem was caused by any carelessness, negligence or malpractice on the part of the doctors who [4-125] treated you in the Veterans Hospital.
A In June 1971.
MR. KUBY: Cross-examine.

(Recess taken at 4:25 P.M. until 4:35 P.M.)

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. HOLL:

Q Mr. Kubrick, can you read my lips if I stand here and talk to you?
A Yes.
Q Do you have any difficulty reading my lips at this rate of speech?
A What I don't get I will tell you.
Q Isn't it true, Mr. Kubrick, that on November 15, 1968 was the first time you went to visit Dr. Sataloff?
A I went to see him I believe it was in November.
Q When you went to see Dr. Sataloff that day, did you tell him that you had been to see Dr. Cole?
A Yes, I did.
Q About what, your hearing problem?
A Yes.
Q Did you tell Dr. Sataloff that first visit that you had been to see Dr. Soma?
A Yes, I did.
Q About your hearing condition?
[4-126] A Yes.
Q Did you tell Dr. Sataloff that you had been to the Geissinger Medical Center about your hearing condition?
A Yes, because that's where Dr. Cole is.
Q Dr. Cole is at the Geissinger Medical Center?
A Yes.
Q Now, had you told Dr. Sataloff on the first visit that you had been in the hospital recently?
A Yes, I did.
Q Did you tell him you had been in the VA Hospital in Wilkes-Barre?
A Yes, I did.
Q Did you tell him that you had your right leg operated upon?
A Yes, I did.
Q Isn't it true, Mr. Kubrick, that you told Dr. Sataloff that you had received antibiotics in the hospital?
A I don't know if it was that first day or the second visit. But I told him.

Q First or second visit?
A Yes.
Q And isn't it true, Mr. Kubrick, that you told Dr. Sataloff that you had received heavy dosages of antibiotics?
A No, I did not tell him that because I had no way of knowing how much I received.
[4-127] Q Well, you did testify last week, didn't you, about how much of the fluid they had administered to you?
MR. KUBY: I would object to that, sir. When you are talking about heavy dosages, you are talking about a relative term, a medical term. He can certainly testify to a factual thing which he did.
MR. HOLL: What I'm asking him, Your Honor, is whether he used those words.
THE COURT: Objection overruled.
Objection is really sustained because I don't think that was your question. So rephrase your question.

BY MR. HOLL:

Q Did you tell Dr. Sataloff, either the first visit or the second visit, that you had received heavy dosages of antibiotics?
A No, I did not.
Q You never used those words?
A No, I did not.
Q Did you tell him after the first or second visit that you had received heavy dosages of antibiotics?
A No, I had no idea of the dosage I had until 1974, '75 when Attorney Anapol showed me the hospital records.
Q But you did tell Dr. Sataloff that you had received antibiotics at the Veterans Administration?
A Neomycin, yes.
[4-128] Q And you knew it was neomycin?
A I was told I was going to be given it, so I assumed it was neomycin.
Q You told that to Dr. Sataloff, didn't you?
THE COURT: When?

BY MR. HOLL:

Q And that was the first visit with Dr. Sataloff that you told him?
A Or the second visit.
Q When was your second visit?
A I don't know offhand when that was.
Q Well, was it in 1968?
A Yes, I believe it was.
Q Do you know whether Dr. Sataloff wrote to the Veterans Administration Hospital in Wilkes-Barre asking for some information about your hospitalization?
A Yes, he said he was going to send for the hospital records.
Q At any time that you met with Dr. Sataloff did he tell you he had received some information?
A Yes, he did.
Q From the Veterans Hospital in Wilkes-Barre?
A I don't know where the records came from but he got them.
Q About your hospitalization of April 1968?
A Yes.
Q Isn't it true that Dr. Sataloff after looking at the [4-129] records told you yes, you had received neomycin?
A Yes, he told me I received neomycin.
Q When was that?
A I believe it was in April. The beginning of April of 1969.
Q April of 1969?
A Yes.
Q Did you meet with Dr. Sataloff in January or February of 1969?
A I believe I met him in January. I have to look up the records. I am not sure.
Q Did you meet with Dr. Sataloff prior to March of 1969?
A Possibly, yes.
Q Did Dr. Sataloff tell you prior to March of 1969 that neomycin had caused your deafness?
A He never told me it caused my deafness.

Q Did he tell you anything about neomycin and your deafness prior to March of 1969?
A Not to my knowledge. I don't remember.
Q Do you remember writing to the United States Naval Hospital at Bethesda, Maryland?
A Yes.
Q When did you do that?
A My wife wrote the letter.
Q When did she do that, do you know?
[4-130] A I don't know the date.
Q Was it early in 1969?
A I would have to see the letter before I could answer that.
Q Do you remember receiving a letter from the U.S. Naval Hospital in Bethesda, Maryland?
A Yes, we did.
Q I show you what is marked No. 1, D-1. Do you recognize that letter, Mr. Kubrick?
A Yes, I do.
Q Do you remember receiving that letter?
A Yes.
Q Now, doesn't that letter say generally speaking or basically that the U.S. Naval Hospital agrees with Dr. Sataloff's opinion?
MR. KUBY: I think the letter speaks for itself.
THE COURT: Let me see it.
MR. HOLL: It is Number 1 in your packet.
THE COURT: Well, it may speak for itself but he is certainly entitled to cross-examine him on it.

BY MR. HOLL:

Q If you read the letter, Mr. Kubrick, isn't the U.S. Naval Hospital in Bethesda, Maryland, telling you that Dr. Sataloff's opinion is correct?
A Yes, Dr. Sataloff's opinion was that there was a possibility and that is what they agreed with, just a possibility.
[4-131] Q And he gave you then that opinion prior to the time you received this letter, didn't he?
A Yes, he did.

Q So, isn't it true that Dr. Sataloff probably told you about this possibility of causing your deafness by neomycin sometime in January or February or 1969?
A Well, I remember now when I said it yesterday it was two months back from when I filed my opinion. Which would take that back to February.
Q Now, Mr. Kubrick, you remember you have already discussed the claim you filed for Veterans' benefits due to your hearing condition. Do you remember talking about that?
A The initial claim?
Q Yes.
A Of April?
Q Yes.
A Yes.
Q And that claim was filed April 16, 1969; is that right?
A Yes.
Q I show you what is marked D-2. Mr. Kubrick, would you please read it for me.
A I tried to read this the last time and I cannot read this letter. I did not fill it out. Mr. Dudish filled it out and had me sign it.
Q Well, Mr. Kubrick, do you remember basically what this [4-132] letter contains?
A It is a claim for service connection for defective hearing.
Q And didn't you tell the VA that Dr. Sataloff had told you about the connection between neomycin and your deafness?
A The possibility, yes. And Dudish sent a letter from Dr. Sataloff.
Q This letter, though, Mr. Kubrick, doesn't say anything about a possibility, does it?
A I would have to see the letter.
Q You can't read it at all?
A I know I told Dudish and it should be in there. I said I signed this letter but he filled it out.
It says would you please consider a supplementary claim for a bilateral defective hearing condition as the result of medication prescribed during my pre-operative

hospitalization. In September 1968—I can't make that next word out.

Q Mr. Kubrick, can you see about in the middle of the page. Look at the middle of the page where it says "I have been receiving treatment" and read that for me.

A I have been receiving treatment by Dr. Sataloff, 721 Pine Street, Philadelphia, Pennsylvania and he is of the opinion that the cause of my condition or hearing is as a result I can't make the other words out.

Q Could that be as the result of medication?

A That could possibly be prescribed.

[4-133] Q Could the next word be prescribed?

A It could be. —as a result of my hearing condition.

Q By that claim didn't you want the VA to contact Dr. Sataloff?

A I told Dudish—he said he would have Dr. Sataloff send him a letter and get a return to see what Dr. Sataloff regarded.

Q Do you know if Mr. Dudish did that?

A Yes, he did.

Q Now this April 16, 1969 claim was the first claim you had ever filed for Veterans' benefits due to your hearing condition, wasn't it?

A Yes.

Q And you appealed from adverse decisions many times over a period of years, didn't you?

A Yes.

Q But this was the only claim that you actually filed initially, wasn't it?

A I believe it was.

Q Isn't this the claim that after all your appeals were done was finally denied in August of 1972?

A I believe it was August of 1972.

Q Isn't it true, Mr. Kubrick, that this claim of April 1969 was really based in your mind on the carelessness of the doctors involved?

A No, it was not.

Q Or were on their negligence?

[4-134] A No, it was not.

Q How about the negligence of the hospital or nurses?

A No.

Q Or malpractice?

A No. I always thought they did the right thing.

Q Well, Mr. Kubrick, that is what your complaint says in this case. The piece of paper that started this lawsuit says that.

Q Which paper is that?

MR. HOLL: No. 62, Your Honor, in the list of documents.

A I was never given this copy.

BY MR. HOLL:

Q Have you ever seen that piece of paper before?

A No, I have not.

Q Will you read the sixth paragraph?

A The plaintiff William A. Kubrick learned for the first time the injury he suffered during his hospitalization of April 2, 1968 to April 30, 1968 at the Veterans Administration Hospital, Wilkes-Barre, Pennsylvania, was the result of medical malpractice, carelessness, negligence of the physician, professional nursing staff, agents, servants, employees of the Veterans Administration. He filed a claim with the Veterans Administration on August 9, 1970. And the Veterans Administration denied the claim. Hence plaintiff's claim is untimely under the Veterans Administration [4-135] Tort Act.

I never saw this. I never signed anything like this.

Q That was signed by your former attorney, Mr. Anapol?

A Well, then I did not see it.

Q When you went to see Mr. Anapol about your case, didn't he ever tell you that he was going to file a lawsuit?

A He told me he was going to file a lawsuit. I remember I asked him how much he was going to file for but he never would tell us.

Q Didn't he talk to you about filing it?

A Filing it but he never showed it to me.

Q Well, did he ask you questions about what happened to you?

A I gave him all the papers and he was supposed to get it from the papers and all.

Q Didn't you ever tell him what happened to you?
A I told him what had happened to me, yes.
Q Didn't you ever tell him that you thought that you had been wronged by the Veterans Administration??
A No, I never told anybody that.
Q You never even told Mr. Anapol?
MR. KUBY: Your Honor, the word wronged I don't think has any meaning or significance in this context. Wronged in what way?
[4-136] MR. HOLL: I will rephrase the question.

BY MR. HOLL:

Q When you were talking to Mr. Anapol about the possibility of filing a lawsuit, didn't he tell you that he was filing a malpractice case?
A He did not say he was filing a malpractice case until after he went to see Dr. Sataloff. And I went with him.
Q And then he told you?
A Yes, after Dr. Sataloff said that it was the cause of my hearing loss.
Q Dr. Sataloff?
A Yes.
Q Not Dr. Soma?
A Dr. Soma told me in June and Dr. Sataloff told Attorney Anapol when we visited him.
Q Did you tell Mr. Anapol that you thought the Veterans Administration had been negligent?
A I told him what Dr. Soma told me. And he took his own conclusions from that.
Q Did you ever tell Mr. Anapol that when you filed your claim in April of 1969 for VA benefits for your hearing condition that you did so because you thought the VA had been negligent?
A No, I did not.
Q Do you know whether Dr. Sataloff ever rendered an opinion to Mr. Dudish at his request?
[4-137] A Yes, he did.
Q Isn't it true that that opinion was rendered in June of 1969, June 30th; do you know?
A I don't know when the letter was sent to him.

Q I show you what is marked D-2. What does Dr. Sataloff in that statement say about the cause of your hearing loss?
A He said there is only a chance of it being caused by neomycin.
Q Would you read the words he says.
A There is an excellent chance that Mr. Kubrick's present hearing loss is the result of neomycin toxicity. He gives a history of medication with this drug prior to the onset of the hearing loss. Enclosed is a copy of this audigram and there is a progressive degeneration of his hearing in the period of several months.
Q Did you believe Dr. Sataloff's opinion?
A Only that there was a change in my hearing being caused by it.
Q Did you believe there was an excellent chance when he told you that?
A He never told me that. What he put in there he never told me. He just always told me a possibility. And that's it.
Q You knew, though, what Dr. Sataloff told Mr. Dudish, didn't you?
A Yes, I know what he told Mr. Dudish.
Q Well, you knew it when he told Mr. Dudish, didn't you?
[4-138] Knew what?
Q What his opinion was.
A That it was a chance of causing my hearing loss.
Q Did you believe him when he told you he thought—
A There was possibly a chance, yes.

BY THE COURT:

Q Mr. Kubrick, you have testified that when you got the initial decision from the Veterans Administration to the effect that your hearing loss was not caused by anything that happened in the hospital that you accepted that; is that correct?
A Yes.
Q Now at the same time you are saying Dr. Sataloff had told you there was a strong possibility of that. Did you believe Dr. Sataloff and believe the Veterans Board?

A I didn't know what to believe. That is why we sent all the other letters to try to find out what did cause my hearing loss.

MR. KUBY: If Your Honor please, I don't believe that Mr. Kubrick has ever testified that he accepted the initial decision of the Veterans Administration which said there was no causal relationship.

THE COURT: Do you agree with that, Mr. Holl?

MR. HOLL: That he did not agree with the Veterans Administration?

THE COURT: Well, he has said on numerous [4-139] occasions that he didn't agree with them. I seem to recall that at some point or other he said that he accepted that decision.

MR. HOLL: I think it is obvious that he didn't by what he did later.

THE COURT: O.K. Go ahead.

MR. KUBY: I think you may be making a distinction between the causative relationship which he never accepted and their statement that there was no malpractice, negligence, carelessness, which he always accepted until June of 1971.

THE COURT: I don't know that the notion of malpractice was implicated earlier.

MR. KUBY: Except that it comes in all the documentation. The documentation is twofold. From the Government they first say there is no causation; and, secondly, they say there is no evidence of malpractice, carelessness, et cetera.

MR. HOLL: That's right, Your Honor. In every document in which a decision is rendered that language is in there.

BY MR. HOLL:

Q Mr. Kubrick, during the summer of 1969 did you go to see Mr. Dudish again?

A I don't believe I went to see him again.

Q Did you ask Dr. Sataloff to write a letter to Mr. Dudish at one point urging Mr. Dudish to help you?

[4-140] A I believe I did.

Q Isn't it true that Dr. Sataloff in fact did write a letter to Mr. Dudish on September 16 of 1969?

A I believe he did.

Q Now in that letter Dr. Sataloff tells Mr. Dudish that—

MR. HOLL: By the way, Your Honor, this is Government Document No. 7.

BY MR. HOLL:

Q That Dr. Sataloff tells Mr. Dudish there is a very excellent possibility that his hearing damage could have been due to the use of neomycin by irrigation; isn't that what that says?

MR. KUBY: I can stipulate that you read it correctly.

A Yes, he said there was an excellent possibility.

BY MR. HOLL:

Q And prior to writing that letter to Mr. Dudish when you asked Dr. Sataloff to write the letter, didn't he give you that same opinion?

A No, he did not. He never put excellent in it.

Q By the way, did Mr. Dudish, to your knowledge, follow through?

A As far as I know he did.

* * *

[5-7] Q But you had had a bad experience with a lawyer?

A Yes.

Q Well, the first lawyer that you saw in connection with this matter was Mr. Sagot.

A Yes.

Q Did you consider going to a lawyer before Dr. Sataloff told you you ought to get a lawyer?

A Was I what?

Q Did you think about or talk about getting a lawyer before Dr. Sataloff told you you ought to get a lawyer?

A No, I did not, because I had no reason to believe I needed one.

Q You thought you could take care of this yourself?
A I had nothing to say to him. What would I need a lawyer for the case? All I was asking that the drug neomycin could have caused my hearing loss and I was trying to get compensation for it.
THE COURT: O.K.

BY MR. HOLL:

Q Now the denial that you received from the VA in August of 1969 was a denial for service-connected benefits, wasn't it?
A Yes.
Q And the reason for the denial was, one, was it not, that the VA decided that the neomycin you received did not cause your [5-8] deafness; isn't that true?
A I believe that was what they said. But I would have to read the letter that you are referring to.
Q And you disagreed with that, didn't you?
A Yes.
Q And the other reason for the denial was, was it not, that there was no evidence of negligence, carelessness or fault on the part of the Government?
A Yes.
Q And you disagreed with that too, didn't you?
A That I disagreed. I didn't believe they were careless or at fault or negligent in any way.
Q But you understood what they meant by that, didn't you?
A At that time I started, yes.
Q Now, Mr. Kubrick, I want to show you the critical record, the report from the hospital that was associated with the denial of August 1969.
MR. HOLL: Your Honor, that is No. 6.

BY MR. HOLL:

Q Have you ever seen that before?
A Not until after Attorney Anapol showed it to me.
Q Now, do you know what this is?
A Do I what?
Q Do you know what that is?
A It is a clinical report.

[5-9] Q And do you know what it is about?
MR. KUBY: If Your Honor please, it seems to me this would be totally irrelevant if he did not see it until he was shown it by Mr. Anapol after he retained Mr. Anapol, which was subsequent to the summer of '71.
MR. HOLL: I just want to know if he knows what it needs, Your Honor, that is, the basis for the denial.
MR. KUBY: Well, if he didn't see it what is the relevance of it?
THE COURT: Which document is this?
MR. HOLL: No. 6.
THE COURT: What is your offer of proof?
MR. HOLL: Your Honor, this is the original board that met to determine whether or not Mr. Kubrick's claim for service-connected benefits would be allowed. And this document is the basis of the denial in August of 1969.
THE COURT: I understand.
MR. HOLL: And I'm offering it to see whether or not Mr. Kubrick understands what is said there.
MR. KUBY: But it's testified by Mr. Kubrick that he did not see it until Mr. Anapol apparently secured it and showed it to him after he retained Mr. Anapol.
THE COURT: Well, if he never saw this clinical record until after he retained Mr. Anapol, what relevance would it have? What probative value would it have?
[5-10] MR. HOLL: The fact that it is the basis of the denial. I want to know if he understands what the basis is if they state it in writing.
THE COURT: I sustain Mr. Kuby's objection. To ask this witness about the basis of a denial which he never saw or he never heard of until after the period relevant to this whole dialog, namely, the period during which under your theory the statute ran would it seems to me have no probative value. Now maybe I'm missing something, Mr. Holl.
MR. HOLL: No, I don't think so.
THE COURT: O.K. We disagree.
Objection sustained.
Unelss you disagree with the factual predicate of Mr. Kuby's objection. Ask him when he first saw it.
MR. HOLL: He already testified to that.

THE COURT: Well, ask him again. If you want to pursue it. I know he has answered it once.

MR. HOLL: No, that's all right.

THE COURT: Fine. Then proceed with the next question.

BY MR. HOLL:

Q Now, Mr. Kubrick, did you ever see a statement of the case that presented the reasoning for the denial of your claim for service-connected benefits?

A I believe I did, in September.

[5-11] Q In September of 1969?

A Yes.

MR. HOLL: This is No. 9, Your Honor.

BY MR. HOLL:

Q Is that what you saw?

A I believe it is.

Q And that statement of the case said that your claim for benefits, for service connected benefits—

THE COURT: Mr. Holl, I don't want to get the record confused. You are now referring to Government Exhibit numbers on this compendium which you gave me. But these documents will go in under plaintiff exhibit numbers. And if the Court of Appeals is looking at this record some day they may get confused.

MR. KUBY: Every time I noted a—

THE COURT: Well, I know you noted both. So maybe Mr. Holl ought to do the same.

MR. KUBY: That is P-13, sir.

THE COURT: Well, why don't you just chime in.

BY MR. HOLL:

Q Now, Mr. Kubrick, isn't it true that that statement of the case as you understand it gave two reasons for denying your claim for service-connected benefits?

A I would have to read the reasons.

Q You don't remember what it says?

A No.

[5-12] Q But you did read it in September of 1969?

A Yes, I read it.

Q And is it your testimony that you understood what you read when you read it in September of 1969?

A No, I would say some parts I might not have understood.

Q Can you tell me which parts you may not have understood?

A I would have to read it.

Q Would you please read the sentence I just pointed to?

A No carelessness, accident, negligence, lack of proper skill, error in judgment or other instance of indicated fault on the part of the Veterans Administration has been shown, so that the decision denying service connection for additional disability due to hospital treatment is found correct and affirmed.

Q Do you remember reading that in September 1969?

A Yes, I did.

Q Did you understand what they meant when they said that?

A That they were not at fault.

Q You understood that?

A Yes.

Q Now, isn't it true that on December 29, 1969 you then filed an appeal to the Board of Veterans Appeals?

A Yes, I believe it was then.

MR. HOLL: This is No. 17 on the Government's list.

[5-13] MR. KUBY: P-21.

BY MR. HOLL:

Q Is that the appeal that you filed?

A Yes, it is.

Q Would you turn to the second page, please.

Now in the first paragraph of the second page, Mr. Kubrick, you talk about the procedures that were performed in the hospital when you were in the hospital in April 1968, don't you?

A Yes.

Q And at times during that paragraph you dispute what was said in the statement of the case by the VA, don't you?

A Yes.

Q Where did you get these bits of information about your hospitalization?
A May I look at it?
Q Certainly.
Mr. Kubrick, in that first paragraph of the second page of your appeal you were disagreeing with the facts in the statement of the case published by the VA, weren't you?
A Yes.
Q Where did you get these facts that you wrote in this appeal?
A Which ones are you talking about?
Q Any of the ones that you disputed.
[5-14] MR. KUBY: Well, that's a broad thing. Can you be more specific.
THE COURT: Be more specific. Which page?
MR. HOLL: Second page, first paragraph, Your Honor.
MR. KUBY: That is about 30 lines.
MR. HOLL: That paragraph contains many different disputes.
THE COURT: Which paragraph?
MR. HOLL: The first paragraph on the second page.
THE COURT: Which starts?
MR. HOLL: Admitted April 2nd, 1968. The document is No. 17 on our list. It is entitled Disagreement of Facts of the Issue.
THE COURT: O.K. I have it.

BY MR. HOLL:

Q Now that paragraph contains all kinds of disagreements of facts, doesn't it?
A Yes.
Q Where did you get the facts that you put in that paragraph?
A The one that you have underlined you want answers to?
Q Any of the facts.
MR. KUBY: Well, I think again—
THE COURT: Let's take it one by one.

[5-15] BY MR. HOLL:

Q Mr. Kubrick, you disputed the size of the cavity in your leg, didn't you?
A Yes.
Q Where did you get the idea that you should do that?
A Because they said in there, stated that it was—I'm not sure. I would have to see that statement.
Q What makes you think that is not true?
A Because of my leg.
Q You mean because of your scar?
A Yes.
Q You also said that neomycin was given to you orally as well as by the hemovac tube system?
A Well, at first Dr. Wetherbee I thought he said that I was going to get medicine through a tube and orally. And I just assumed it was neomycin I got orally at that time.
Q So that was another dispute you had with the VA statement?
A At that time.
Q And you disputed the length of time that the hemovac tube system was used, didn't you?
A Yes.
Q Where did you get the idea that you should dispute that?
A I do not know exactly how many days it was. But I knew it was longer than ten days, I assume. So we just averaged. They said ten and we said twenty.
[5-16] Q Where did you get the 20 days from?
A Just set it.
Q You just made it up?
A Yes. Made up for the simple reason for they are to tell us how many days it was really given. That's all.
Q Now you also disagreed with the VA statement that you improved and healed and didn't have any complications, didn't you?
A Yes.
Q Why did you disagree with that?
A There were complications such as the patient losing 35 pounds, is that what you are referring to?

Q Why did you dispute the fact that the wound healed and you got better?

A I am trying to find that in here.

Q It starts with the sentence "The summary states".

A The summary states casually "He improved, healed and no complications. He was discharged. Contradictory there were complications such as the patient losing 35 pounds in his 29-day stay. Patient in such severe pain had to be given morphine every four hours. Patient only sat at his bedside and in a wheelchair the last few days of his stay."

That we referred to the complications while I was in the hospital.

Q Isn't it true that you wanted to point out to the VA that [5-17] there were a lot of things done that they didn't put in their statement?

A No, I did not.

Q Then why did you make that statement then?

A Because that's what it was. That is my belief.

Q And this was in disagreement with what they said in their statement, wasn't it?

A Well, their statements referred to after I was discharged. And my statement referred to while I was in the hospital.

Q But the title of that paragraph in this page is disagreement of facts of the issue, isn't it?

A What?

Q The title on the top of the page?

A Yes.

Q Is disagreement of facts of the issue.

A Yes.

Q So you were disagreeing with the facts that the VA put in their statement, weren't you?

A If you would let me explain something.

Q Certainly.

A When we got the decision in September we went to see Mr. MacDade. And Mr. MacDade's office, his secretary told us at that time if you didn't contradict what the VA said they would take it and put it down as being true. So we contradicted what we thought we should contradict.

[5-18] THE COURT: Mr. Kubrick, turn to the next page, Page 3.

MR. HOLL: I was just about to that, Your Honor.

BY THE COURT:

Q Now you state there not a small abscess cavity, rather a 10-inch cavity. It is stated a one percent neomycin solution was used. This is questionable. However, the 10-day period mentioned is a—let me skip a bit.

And then I go down to this sentence.

> "It is also untrue that the Veteran never received the drug systematically. There is also a difference of opinion in the statement about the adverse reaction mentioned on the packaged literature. It has been found, depending on quantities used to irrigate, definitely possible that hearing loss can occur and be directly caused by if enough high blood level of the drug was reached."

Now, did you write that?

A My wife wrote that.

Q Did you or your wife have any professional help in writing this from a lawyer or a doctor or anybody?

A No professional help we didn't have at the time.

Q You and your wife did this all on your own without any professional help?

A Repeat that again.

Q You and your wife wrote this all on your own without any [5-19] professional or expert help?

A No, on that part there that you are referring to, when I was working up in RCA and I went into the dispensary and I had a sty on my eye and the nurse was treating it she had a book on the table and I asked her what that book was. She told me it was a book on drugs.

I asked her if it had neomycin in it.

She said yes. And she looked it up for me and read part of the thing out of it. A Physician's Desk Reference. I did not read it. She read part of it and I went home and told my wife they said that in the book.

Q Was this while you were still working for RCA?

A Yes.

Q Did you talk to her about the problem?
A No.
Q Did you talk to her about whether they should have given you neomycin?
A No.
Q Or the effects of neomycin?
A I couldn't talk to her about anything because I was afraid of losing my job if they ever found out I was losing my hearing. She would be compelled to tell them if I told her that.
Q Now when you wrote or your wife wrote that "There is also a difference of opinion to the statement about the adverse reaction mentioned on the packaged literature" and when you further wrote [5-20] "It has been found, depending on quantities used to irrigate, definitely possible that hearing loss can occur and be directly caused by if enough high blood level of the drug was reached".
Did it occur to you maybe somebody had done something wrong or had been negligent or careless when you wrote that?
A It never entered my mind on that.
THE COURT: Go ahead, Mr. Holl.

BY MR. HOLL:

Q Mr. Kubrick, the very next paragraph starts "The board". Do you see that paragraph?
A Is it on the first pace we are on?
Q Page 3. Would you read where it starts "The board"?
A The board also made the statement on this day, quote, they found no evidence of carelessness, accident, negligence, lack of proper skill, or error in judgment, or any other fault. This is a mighty broad statement, covering a lot of territory. Are we talking about men, or God. I do not think that such a statement could apply to any person on this earth. However, we do not believe that this happened due to carelessness, improper skill but would rather believe is the outcome of error in a mortal man's judgment, or accident, especially when considering the rundown state of the patient.

Q What you wrote about the board saying carelessness, negligence, that came from the statement that the VA had sent you, [5-21] didn't it?
A Yes.
Q And you knew what they meant, didn't you?
A Yes.
Q What did they mean?
A That they were not at fault and it was not careless or negligent.
THE COURT: You can't ask this man what they meant. You can ask him what he thought they meant. That is what is relevant, Mr. Holl.

BY MR. HOLL:

Q Isn't it true that you thought the VA in their statement meant that they weren't careless or negligent?
A Yes.
Q Would you explain to me, please, what you meant by the words "would rather believe this the outcome of error in a mortal man's judgment"?
A Well, when they made the decision that the drug neomycin couldn't cause my hearing loss, that is what I meant by that error. That they erred in their judgment of my decision.
Q But just before you wrote that you were talking about the board's decision about negligence, weren't you?
MR. KUBY: That's objected to as being argumentative.
THE COURT: Read the question and answer back.

[5-22] (The last question was read.)

THE COURT: Overruled.
Put the question again.

BY MR. HOLL:

Q Just before in that same paragraph you read the words "error in a mortal man's judgment". Weren't you discussing the VA Board's statement about negligence?
A No, I never thought they were negligent in their duties.

Q That is not my question, Mr. Kubrick. Just before the words appear in your letter—

A Wait a minute. This appeal or mine? Where are you referring to?

Q The words in front of you, Page 3, "Error in a mortal man's judgment". A few sentences before that, above that you were discussing the VA Board's statement about negligence, weren't you?

A I didn't mean negligence. I was just disagreeing.

Q But your comment about error in a mortal man's judgment comes right after your discussion about the board's statement on negligence, doesn't it?

A It comes after—

MR. KUBY: Objection. There are elements in that first sentence which make this question completely improper I submit, sir.

THE COURT: Objection is overruled.

[5-23] BY MR. HOLL:

Q Mr. Kubrick, would you please turn to Page 5 in the paragraph that starts "This article". Do you see that?

A Yes.

Q Do you know what that says? Don't read it but do you know what that says?

A No, I don't.

Q Then would you please read it.

A This article further states "The statement from his physician, Dr. Sataloff, who is highly trained and most capable in his field was speculative, suggestive of the possibility, not a positive finding. It is a definite fact that other prominent men in this field have shared and respected his opinion. It is further believed he would risk his reputation if he sincerely did not believe and base his report on some solid evidence on which to base his belief.

Q Isn't it true when that was written you firmly believed that Dr. Sataloff was right?

A That there was a possibility, yes.

Q And you disagreed with the VA's statement, didn't you, that the drug did not cause your deafness?

A Yes, I did.

Q Now the small paragraph that starts "It may be worthy to note". Would you read that.

A It may be worthy to note Dr. Sataloff got his information [5-24] from them and their records at the Wilkes-Barre Hospital on which to base his opinion, not from me. He merely informed me of the findings.

Q So, isn't it true that you were telling the VA in that paragraph Dr. Sataloff found from the medical records and told you that neomycin was the possible cause of your deafness?

A Was the possible cause of my deafness, yes.

Q He informed you of that?

A Yes.

Q Now, Mr. Kubrick, in the last paragraph of Page 5 a sentence starts "Now I should". Would you read that sentence?

A Now I should think not deliberate, but merely a fact of error or other undeliberate instance, this however is most unfortunate for the one who has the burden of ill-health, who also then bears the burden of an unjust decision.

Q When that sentence was written, what did you think that had to do with the VA's decision that neomycin didn't cause your deafness?

A That sentence did not refer to that. If you look at the statement of facts, that statement is from the first part concerning my back. If you look at that in the same words that were used at the top of that sentence. Concerning my back only.

Q So you are saying that was a fact of error when you made that statement, that didn't have anything to do with your hearing loss?

[5-25] A No, it did not.

BY THE COURT:

Q Back on Page 3 where you say "However, we do not believe that this happened due to carelessness, improper skills but would rather believe this the outcome of error in a mortal man's judgment, or accident, especially when considering the rundown state of the patient". It is your

testimony that when you talk about error there you are talking about the board's decision being in error?

A The board's decision that the neomycin could not cause my hearing loss.

Q That's the error you are talking about there?

A Yes.

Q And you weren't talking about the possibility of there being an error which just could have happened like things happened in life without carelessness or negligence?

A Yes.

Q You are talking about the board's decision?

A Yes.

* * *

[5-69] Q But suffering the consequences of an error also meant the board's error; is that right?

A The board's error. Because I had to lose work and didn't have the money to get along with and it was financial disaster.

Q Now, Mr. Kubrick, the very last sentence on Page 2 says "Perhaps you recommend me to a hospital or doctor capable of correcting this error". What does that mean?

A Like I said, I didn't read all of this. I have to read it now.

That the error was the loss of my hearing. And if any doctors or hospitals could possibly through surgery or anything help me. And none of them said so.

Q Mr. Kubrick, isn't it true that all along your claim for disability benefits for your hearing condition was based upon your suspicion that the hospital or the doctors on the staff had done something wrong?

A No.

Q If that is true, Mr. Kubrick, then isn't it also true that the VA would have no way of knowing that you thought about malpractice because you didn't?

A Repeat that again. I didn't get all of that.

Q Isn't it true, Mr. Kubrick, if you never believed there was negligence or carelessness the VA would have no reason to believe you thought so?

A I never believed they did.

* * *

TESTIMONY OF DR. J. SATALOFF

* * * *

[5-82] BY MR. KUBY:

Q Dr. Sataloff, where did you first have occasion to examine and treat the plaintiff in this case, William Kubrick?

A 11-15-68.

Q Where was that, sir?

A In my office in Philadelphia.

Q Did you take a history from Mr. Kubrick at that time?

A Yes, sir.

Q Would you please tell us what he said to you.

A In summary he said he developed sudden bilateral ringing tinnitus during the past four months. Started roughly in July [5-83] and it was getting worse. His hearing was also deteriorating, especially during the past two months.

He indicated he was in the hospital about April or May for osteomyelitis and received heavy doses of pain killers and antibiotics. He denied having any familial deafness and said he received much gunfire about eight years ago.

He also indicated that he was tested at the Gessinger Hospital and was told that the cause of his hearing loss was a viral infection and indicated that he was also tested at the Veterans Administration Hospital and was told it was as a result of the medication that he had received.

Q Now what, if anything, did you proceed to do at that point as far as an examination of Mr. Kubrick is concerned?

BY THE COURT:

Q What was the date of this, Dr. Sataloff?

A 11-15-68.

THE COURT: Go ahead.

THE WITNESS: Well, apparently it was obvious that this gentleman had a progressive nerve deafness from all our findings and it was important to establish a diag-

nosis so we could tell him the cause effect and what he might anticipate. The obvious lead was the fact that he had received drugs that could well have caused this hearing loss. And so I wrote to the Veterans Administration trying to explore the kind of drug he had received to determine if that was the cause. That letter [5-84] was sent several days later and actually November 18, 1968.

BY MR. KUBY:

Q Would you please read that letter, sir.

A This letter was sent to Dr. Mazaleski who was apparently the referring physician who said:

> I've just done an otologic study on Mr. Kubrick who is under your care. The enclosed audigram reveals a substantial degree of bilateral nerve deafness involving the high frequencies. The damage is to the hair cells of the cochleum on both sides. Mr. Kubrick's ability to distinguish sound is especially reduced in the left where it is less than 50 percent of what he hears. The etiology of this condition could well have been some ototoxic drug or auditory or cochlea neuritis. We are investigating the drugs that he received during his recent hospitalization and I hope we can prevent further degeneration of his hearing.

Q Now, Dr. Sataloff, in laymen's language what did you find wrong with his hearing at the time of the first examination?

A He had nerve deafness, which means the telephone cable and the microphone that carries messages from sound waves in the air when you speak to the brain had been damaged so that they were unable to convey the messages in an understandable form.

Q And in order to reach this diagnosis did you perform tests?

A Yes, sir.

[5-85] Q Just for the record, what were those tests?

A Well, basically the tests are certain pure tones to determine which areas of the microphones in the ears were damaged and the ability to distinguish sound. Like I am talking to you. If you had nerve deafness you might

distinguish maybe 80 percent, 70 percent or less of what I say to you.

Q Now you indicated in your letter to the referring doctor that there was loss of high tones. Can you explain the tonality of hearing in laymen's language?

A Well, the basic difficulty with most nerve deafness is not that the problem is in hearing but in distinguishing what is being said. And that is why older people continually say "What did you say?" Because they lose the ability to distinguish one consonant from another and it is the consonants that give language meaning. So if I say sick it sounds like thick. If I say yes it sounds like yet. So they can't distinguish S, F, T and Z one from the other. And in a noisy environment it becomes aggravated or exaggerated.

Their chief difficulty is not so much in hearing but in distinguishing from everyday communication.

Q Did you have any documentation at the time you first saw Mr. Kubrick in your office in November of 1968, and that is, documentation from the hospital where he had this operation?

A No, sir.

Q Did you subsequently receive any documentation?

[5-86] A Yes, sir.

Q Can you tell us when you received documentation for the first time and the extent of the documentation that you did receive?

A January 3, 1969.

Q Can you tell us the documentation that was received?

A It was a letter from the Veterans Administration in Wilkes-Barre signed by a Dr. Powell who was chief of staff. It contained a paragraph summarizing his surgical treatment.

Q And is that all that you received?

A Yes, sir.

Q Did you receive any information on the drugs that were administered to Mr. Kubrick?

A Yes, sir.

Q And was that included in that document that was sent to you?

A Yes, sir.

MR. KUBY: If you Honor please, for the Court's perusal that is the fact sheet of the hospital record that has previously been admitted.

Q Now in that one-page document that was received was a drug mentioned?

A Yes, sir.

Q What was that drug?

A He had oral polycillin and neomycin irrigation through [5-87] hemovac tubes.

Q Was there any information given to you at that time as to the extent of the neomycin that was given to him while he was in that hospital?

A The amount was not indicated, no.

Q Was there ever at that time given to you the number of days that he received that medication?

A No, sir, I did not get it at that time.

Q Did you reach any conclusions, Doctor, after receiving that information?

A Yes; I had no doubt that he had neomycin ototoxicity.

Q In laymen's language what do you mean by that?

A He received an amount of drug that had damaged his hearing. That's a side effect of the drug.

Q Now that was a conclusion that you received in 1969?

A Yes, sir.

BY THE COURT:

Q When did you get those records, Doctor?

A January 3, 1969.

Q And that's when you reached that conclusion?

A Yes, sir.

BY MR. KUBY:

Q Did you have in your mind or are there any other causes for nerve deafness?

[5-88] A Yes, sir, there are many causes.

Q Would you please state for the record what they are?

A Hereditary, cephalitic, other drugs, viral infection, noise-induced hearing loss, premature aging. A number of leukemia and systemic diseases that can cause this picture.

Q When did you next see Mr. Kubrick?

A January 10, 1969.

Q Did you have any discussions with Mr. Kubrick at that time concerning his situation?

A Yes; I have a note that I told him that it was neomycin that caused his hearing loss. And that was also the cause of his ringing tinnitus.

BY THE COURT:

Q What was that date again?

A January 10, 1969.

Q Did you tell him that it was "possible" that it was neomycin that caused his hearing loss or that it was neomycin?

A That it was neomycin, yes.

BY MR. KUBY:

Q Doctor, did you subsequently on his behalf write to the Veterans Administration?

A Yes, sir.

Q When did you next write to the Veterans Administration?

A I don't have a copy of that letter offhand but I received an answer September 5, 1969.

[5-89] Q What did that letter say?

A It was a form letter. He brought it in to me.

We have reviewed your claim for service connection for defective hearing and determined that your alleged hearing loss is not medicinally or medically attributable to your recent hospitalization at the VA Hospital. Accordingly, your claim is denied.

I have the letter now, sir, if you would like, September 16, 1969.

Q That is what you wrote to the—

A Yes, sir.

Q Would you tell us what you wrote to the Veterans?

A Dear Mr. Dudish, There is a very excellent possibility that Mr. Kubrick's hearing damage could have been due to the use of neomycin by irrigation. I base this on the minimal records I have received but in view of the findings I hope you will follow through to obtain for Mr. Kubrick the support that is warranted.

Q You use the phrase "very excellent possibility."

A Yes, sir.

Q Is that the kind of language you used with Mr. Kubrick in your discussions with him?

A No, sir.

Q Well, can you explain why you used it there and why you didn't use it with Mr. Kubrick?

[5-90] A Well, one doesn't always put into writing what he is a little more free to say. There is no question in my mind that the cause was the neomycin. But it is not so easy to go on record and say this to a hospital at this stage of the game. There is no question in my mind at this time that it was neomycin induced.

Q Did you continue to see Mr. Kubrick?

A Yes, sir.

Q At what frequency?

A Every two or three months.

Q Can you just in a synopsis form for the year 1969 tell us what you did for him and how his situation progressed?

A The best I could do was to monitor his hearing and provide some medication that might prevent it from getting worse. And the latter we succeeded. His hearing did not deteriorate over a period of some years to any specific degree but we have no cure for this type of hearing in the high frequencies.

BY THE COURT:

Q What does the medication do, Dr. Sataloff?

A It's supposed to increase the blood supply to the inner ear. It is a peripheral vascular dilator. I am not certain he wouldn't have stabilized without medication. But since it has no bad effects we generally use this.

[5-91] BY MR. KUBY:

Q The medication you say increases the blood supply?

A Yes, sir.

Q To the inner ear?

A Yes, sir.

Q What is that supposed to do? What is the objection?

A Well, if you have a sick nerve or a damage injury—a part of your body and you put heat to it, that's the purpose of the heat. It increases the blood supply and makes regeneration powers if possible or tries healing. And that's the purpose of this medicine.

Q Did you at any time after the letter that you sent—I believe it was in September of 1969—direct any further communication to the Veterans Administration?

A I don't have a record of it but I did receive a letter from them on June 13, 1969.

Q June 13, 1969?

A Yes, sir.

Q And what does that letter inquire of?

A Their letter says this veteran applied for disability benefits and stated he was treated by me for defective hearing and asks for information from me. And I filled out a form which I have here, writing there was an excellent chance of Mr. Kubrick's present hearing loss is the result of neomycin [5-92] toxicity. He gives a history of medication with this drug prior to the onset of his loss. I sent him a copy of the audigram and indicated that there was at that time progressive degeneration in a period of several months.

Q And that was sent June 30, 1969?

A Yes, sir.

Q And at the top it indicated the number of times you had treated him up to that point?

A Yes, sir.

Q Which was five visits; is that correct?

A Yes, sir.

Q Now, did you have any further communication after that, Dr. Sataloff, with anyone at the VA?

A No, sir, not to the best of my recollection.

Q Did you continue to treat Mr. Kubrick during 1970?

A Yes, sir.

Q Dr. Sataloff, I show you a bill listing dates of treatment and the charges for it, which I have noted as P-55. Does that correctly state—

A I charged him $10 a visit until a certain time and then our fees were up to $15.

Q No, but does that correctly list the dates that you saw him?

A It looks reasonable, yes.

[5-93] Q Those are the dates that You saw him?

A It appears to be.

Q Now, did you continue to see him in 1970?

A Yes, sir.

Q And what, if any, treatment did you render to him in 1970 and what was his condition in 1970?

A Well, at one time in June he seemed to be a little worse and developed some dizziness. So I gave him some medication for that. And then I saw him again in September. He seemed to be well stabilized and was doing well.

Q Did you take any further hearing tests?

A Yes, almost every visit we had a hearing test done.

Q How did his hearing progress?

A In 1970 the left ear seemed to be dropping a little but but then it stabilized quite satisfactorily at a pretty good level. And since then there has been no deterioration.

Q Did you continue to see him in 1971?

A Yes, sir.

Q Did there come a time, Dr. Sataloff, in 1971, in the summer of 1971 that you met with Mr. Kubrick in your office and referred him to a lawyer?

MR. HOLL: Objection, Your Honor. It is grossly leading.

THE COURT: Yes, I would have to agree.

[5-94] BY MR. KUBY:

Q Did you meet with Mr. Kubrick in 1971, in the summer of 1971?

A On June 18th of '71 I saw him in the office.

Q Did you have any discussions with him at that point concerning legal counsel?

MR. HOLL: Objection, Your Honor. He is leading.

THE COURT: It is leading, Mr. Kuby.

BY MR. KUBY:

Q What discussions did you have with Mr. Kubrick at that time?

A Well, he and his wife during that period, to the best of my recollection, were very, very disturbed because he had this severe deafness. He had been refused any compensation. He was very distraught. He had little funds available and I felt very sympathetic with him. And he said—and his wife was participating in this discussion—that since they caused his damage that he ought to be compensated and was there something I could do to help. And I felt that this was not within my perogative but I said that the best thing for you to do is to see a good attorney who would be sympathetic for your problem.

And he said: Could you recommend anybody?

At that time there was a gentleman with whom I played tennis. I did not know his competence but I knew him to be a man of high integrity on the tennis court and I thought that [5-95] that was a good indication. So I referred him to him. And that was the extent of our conversation.

Q And who was that attorney?

A A Mr. Leonard Sagot.

Q Did you subsequently meet with Mr. Sagot or someone from his office?

A Someone from his office came in whom I had no contact at all with. I never knew him before.

Q Was that Mr. Anapol?

A Yes, a man named Mr. Paul Anapol.

Q Dr. Sataloff, as of the time that you suggested Mr. Sagot to Mr. Kubrick, had you ever obtained any further records from the Veterans Hospital concerning the drug neomycin?

A No, sir.

Q Did you subsequently to that time obtain the full medical records concerning the hospitalization and the giving of neomycin?

A Yes, sir.

Q From whom did you get those?

A Well, I suspect it was from his attorney.

Q And in what year did you get those?

A I don't remember. '73, '74, something like that.

Q Doctor, at any time from the time you first saw Mr. Kubrick until you suggested a lawyer to him in the summer of 1971, did you ever discuss the issue of his negligence or carelessness or the malpractice of any doctor in the Veterans [5-96] Hospital with him in relationship to the neomycin that was given to him?

A Well, I certainly didn't bring up the issue with Mr. Kubrick but there were many discussions in which he wanted something done to the doctors that caused his deafness. If that's what you mean.

BY THE COURT:

Q Who said what to whom on that subject, Dr. Sataloff?

A Well, both Mr. and Mrs. Kubrick were quite disturbed he had been made deaf by the doctors at the hospital, and that he had no recourse to either compensation or treatment. They wouldn't help him in any direction. I tried to console him as much as possible. I didn't know the facts.

Q But was there any discussion of the notion of fault or blame or culpability in that interim?

A Your Honor, there was no question that it was due to the drug and that the doctors gave him the drug and what was the extent of the culpability.

Q Was there any investigation as to the appropriateness of the drug under the circumstances or alternative drugs or the appropriateness of the dosage? Did you get into that with him?

A That was not within my realm, sir.

Q After you got that face sheet or summary sheet, did you write again for more records to the VA Hospital in Wilkes-Barre?

[5-97] A No, I wrote to—

Q You wrote to Mr. Dudish?

A Yes, that's the one. Because I was concerned the VA was responsible and I was a consultant to the VA, that they ought to assume this responsibility more seriously.

Q You were a consultant to the VA in Philadelphia, I take it?

A No, I was a national consultant to the Veterans in Otology in Washington.

Q But you did not ever formally request the complete hospital records so as to evaluate it?

A No, sir, I did not.

BY MR. KUBY:

Q So that you never discussed the issue of malpractice or negligence with the Kubricks?

A No, sir. Certainly not malpractice, Mr. Kuby.

Q Doctor, subsequent to his referral to a lawyer, did you continue to treat Mr. Kubrick?

A Yes, sir.

Q And you continued to treat him up until when?

A March of '75 he was in last.

Q What was his condition as of March of 1975?

A There was no change from what it was in the past year or two.

* * * *

[5-123] MR. KUBY: I think it was heavy dosages of pain killers and antibiotics.

THE WITNESS: Heavy dosages of pain killers and antibiotics.

BY MR. HOLL:

Q They were his exact words as you recorded it?

A Yes.

Q And that first visit that you had with Mr. Kubrick did you express to him an opinion as to what caused his deafness?

A Well, there was a very good chance that we agreed it could have been the drug that he got.

BY THE COURT:

Q Well, I take it for you, Dr. Sataloff, with your knowing of you field and your knowledge—well, with your knowledge of the field, let's say, when you got that hospital record it didn't take you very long to put two and two together?

A That's right, sir.

Q It was an instant apprehension by you that this was probably the cause, I take it?

A That is was the cause. Not even probably.

Q That is was the cause?

A Yes, sir.

Q In terms of your own thinking, did you stop with the judgment that it was the cause but did you at least think about [5-124] the question whether he got too much or whether they should have given him something else or whether they should have used it as an irrigant, as a wound irrigant?

A Your Honor, it is unavoidable to think in those terms. But I think experience makes you also qualify that statement. You never know what a man has to do when he is saving a man's life or treating infection. I have been involved in many of these cases. And it is very presumptuous to place yourself as God in another man's position in the case, especially a serious medical case.

Q So that if you thought, you kept your thoughts to yourself?

A I did that, sir.

THE COURT: Go ahead.

BY MR. HOLL:

Q Dr. Sataloff, you also testified on direct examination I believe, that Mr. Kubrick expressed to you his feeling of wanting to do something to the doctors for causing his deafness; is that correct?

A Yes. Not physically.

Q Could you be more precise as to what he told you?

A He wanted to take action so that he can be compensated for his handicap.

Q Did you discuss this with him?

A I'm sure I discussed it. He had a handicap and that I felt he deserved compensation. I felt very sorry for him.

[5-125] Q Well, would it be your testimony that from the conversations you had with Mr. Kubrick that he expressed to you that the doctors had done something wrong to him?

A That was the impression that I had. But I never discussed this with him.

Q But you believed that that's what he thought?

A Yes, sir.

THE COURT: Do you object?

MR. MINKOFF: Objection, Your Honor.

THE COURT: Objection sustained. The answer is stricken.

BY MR. HOLL:

Q When did you have these conversations with him?

A About what, sir?

Q About him having feelings that the doctors had done something wrong.

A It is a very natural tendency for a man to have a condition like this and discuss somebody caused the damage to him. He certainly wasn't very happy about it. But I'm sure in many of the visits that he and his wife were very distraught about. And I was very sympathetic, I must say. I spent a lot of time trying to offer the kind of advice that was justified here.

Q Is there any question in your mind, that from the time of the very first visit by Mr. Kubrick with you that he knew the cause or he believed that the cause of his deafness was anti-[5-126]biotics that he received at the Veterans Administration?

MR. MINKOFF: Objection.

THE COURT: The objection is sustained.

BY MR. HOLL:

Q Is there any question in your mind, Doctor, on the very first visit you told Mr. Kubrick it was your opinion that the medication he had received at the hospital could have caused his deafness?

THE COURT: He said that he told him, not that it possibly could have caused his deafness but that it did cause his deafness. Isn't that what you said?

THE WITNESS: Yes, sir.

BY MR. HOLL:

Q Dr. Sataloff, one last thing. You testified that an otologist would probably find out first about the ototoxicity of a drug through the literature.

A Yes, sir.

Q I show you, sir, a document. This is an article, Doctor, that appeared in the June 1969 journal, New England Journal of Medicine written by Dr. David Kelly. Did you ever hear of Dr. David Kelly?

A I didn't think I did. I do now.

MR. KUBY: I didn't get the last answer.

THE WITNESS: I think I know Nilo better than Kelly. But I know the name Kelly. Nilo is one of his coworkers.

* * * *

TESTIMONY OF JOAN KUBRICK

* * * *

[6-100] Q These were you thoughts?

A Yes.

Q Now that is the letter directed to whom?

A Mr. Donald Lee Johnson.

Q He is the administrator of Veterans Affairs?

A Yes.

Q In Washington?

A Yes.

Q Now there has been testimony concerning the use of certain terms in that letter. Medical error and the other similar terms. I am sure you are familiar with that letter but tell His Honor what you mean by the term "medical error" or "error" where it appears in that letter.

A Well, I believed that the board that made the decision they said that neomycin had no connection with a hearing loss. That, in other words, it just couldn't happen. And I believed that they had made an error.

Q Did you, Mrs. Kubrick, at that time, the time of that letter, have any suspicions or had any discussions with any doctors or lawyers or anyone else that gave you any suspicion of carelessness or negligence or malpractice on the part of the Government's doctors?

A No, sir; I thought he had gotten good care at the Veterans Hospital. I felt that they had, the Government, if anybody [6-101] would have, they have the best doctors, the best hospitals, the best everything.

Q When you say on Page 2 where it says:

> "All I care to say in the matter, I suffered the consequences of an error, told the truth, produced sufficient reputable evidence and then suffer further because someone does not feel they can admit to the truth of making a mistake."

What did you mean by that? Specifically the words "error" and "mistake"?

A Well, the board. They made a mistake. They made a judgment. They said neomycin it was impossible for

this to happen. And I felt that like they made a mistake.

Q The last line there:

"Perhaps you recommend me to a hospital or doctor capable of correcting this error."

What did you mean by that?

A Well, one of us made a mistake. Either I made it or they made it. And they weren't believing him that he actually—there were instances they didn't actually believe he had a hearing loss.

Q Can you explain that?

A Well—

MR. HOLL: Objection, Your Honor. As to her testifying as to what they believed or what they didn't believe.

[6-104] Q Your error in thinking that the Government was in error?

A That neomycin had done it.

Q Mrs. Kubrick, I show you a document marked P-31, which is Government 37, dated October 27, 1970, 12 days after you wrote the letter to Donald Johnson. Did you compose and type this letter?

Q Under what circumstances was that composed?

A Under difficult circumstances.

Q What do you mean?

A Well, I had seen it was a desperate situation. All along anything they asked for they were given. First of all, they said that it didn't happen. So, as I said, Bill went and he took that test over on Cherry Street. And then they said: Well, maybe you were deaf before. And we supplied evidence where they could find information about this. And that was, I think, in July of '70 when they were told where to get information. And then we were going to Dr. Sataloff in October.

We stopped in at the VA office in Philadelphia. I asked them if they had gotten this information that they were looking for to decide on this case. And they said: As a matter of fact, no, they didn't get a chance to send for it. They were just sending for it that day. And when you see a man sit up at night, cry by his bed because he can't

sleep it is desperate. They weren't listening to me, they didn't listen to a word I [6-105] said in all these letters.

When someone doesn't listen to you, well, when my kids don't listen to me I shout real loud. I had to get their attention. And I pleadingly wrote to this man to look over these facts to see.

Q Mrs. Kubrick, I direct you attention to the second page, the third paragraph, which says "I do believe your office". Would you read that?

A I do believe you office will be receiving further evidence of the fact that, I had normal good hearing before this drug had be administered, without using proper precautions. I would appreciate this new evidence being placed on file along with other evidence.

Q What did you mean by the words "proper precautions"?

A I was angry and this is my way of shouting to get their attention.

MR. HOLL: Objection, Your Honor. The answer is not responsive to the question. He asked her what she meant by the words.

THE COURT: Overruled.

A I had no basis to really believe that. But these people weren't listening. They hadn't heard a word I said in two years. They didn't even believe him.

BY MR. KUBY:

Q Mrs. Kubrick, I show you a letter, which is marked P-39.

* * * *

[6-120] THE COURT: Go ahead, Mr. Holl.

BY MR. HOLL:

Q Well, Mrs. Kubrick, do you know what a parenthetical phrase is?

A A what, sir?

Q A parenthetical phrase.

A No.

BY THE COURT:

Q What high school did you go to?

A Dickson City.

BY MR. HOLL:

Q Mrs. Kubrick, let's go back a little bit in that sentence to the word "please". Do you see that second sentence, second paragraph?

A Yes.

Q Read with me: "Please keep in mind I already have gone through much, when I lost my hearing as a result of a medical error, whether or not the Veterans Administration cares to recognize the truth".

Mrs. Kubrick, isn't the clear meaning of that to you when you wrote it, that is to you now that when your husband went through a lot when he lost his hearing?

A He sure did.

Q And that is what that meant, wasn't it?

A Yes.

[6-121] Q And that he lost that hearing because of a medical error; isn't that correct?

A No. He lost his hearing because of the drug neomycin. Not that there was anything improper with this drug or improper with the doctors giving it to him. But he lost it from a drug.

BY THE COURT:

Q That is what you felt at that time?

A Yes.

Q Did you take typing in high school?

A No.

Q Where did you learn to type?

A I am kind of ashamed of my typing. I don't type good. I just do it sort of a one-finger type thing.

Q What jobs have you worked at since you got out of school?

A Well, I worked in a glove store in sales selling. I worked in electronics.

Q You were an assembler?

A A laborer.

BY MR. HOLL:

Q Mrs. Kubrick, in the first paragraph of this letter you tell a story about a Mrs. Clare Bussi from Rockville, don't you?

A Yes.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 78-1014

UNITED STATES, PETITIONER

v.

WILLIAM A. KUBRICK

ORDER ALLOWING CERTIORARI

Filed February 21, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1979 291152 376

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1014

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM A. KUBRICK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1014.

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM A. KUBRICK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit, reported at 581 F. 2d 1092, and the opinion of the United States District Court for the Eastern District of Pennsylvania, reported at 435 F. Supp. 166, appear in Appendices A and B respectively of the Petition. Both Courts found in favor of the plaintiff and against the defendant.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Does a medical malpractice claim under the Federal Tort Claims Act accrue when the plaintiff learns of all elements of his claim i.e. causation, damages, the duty owed to him by the defendant and the breach of that duty where (1) plaintiff is hindered from learning both causation and malpractice and (2) the medical causation question is technically complex?

STATUTORY PROVISION INVOLVED.

28 U. S. C. 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing by certified or registered mail, of notice of final denial by the agency to which it was presented.

STATEMENT.

This case stems from a malpractice action initiated by William A. Kubrick, a disabled Korean War veteran, who suffered severe hearing loss and resultant speech impairment caused by post operative leg wound irrigation with a solution of Neomycin Sulfate. The procedure which caused the loss and impairment was administered under the direction of United States Veterans Administration physicians.

An action was filed by Respondent, William A. Kubrick, now 48 years old, against the United States of America under the Federal Tort Claims Act, 28 U. S. C. § 1346 for the profound damage he suffered as a result of the aforementioned malpractice.

The matter was tried before the Honorable Edward R. Becker of the United States District Court for the Eastern District of Pennsylvania sitting without a jury.

The facts as adduced at trial and as found by Judge Becker show that Kubrick entered the Wilkes-Barre Veterans Administration Hospital on April 2, 1968 for treatment of a bone infection (osteomyelitis) of his right leg. After surgery on the affected leg, a Veterans Administration physician ordered that a solution of an antibiotic, Neomycin, be used to irrigate the wound.

In June 1968, Respondent noticed both a hearing loss, and a ringing in his ears (tinnitus). Prior to the administration of the Neomycin, Kubrick's hearing had been completely normal. About six months later (November 1968), Joseph Sataloff, M.D., a hearing specialist in Philadelphia, advised Respondent that he was suffering from bilateral nerve deafness and that the deafness was or probably was caused by the administration of Neomycin.

Respondent then sought increased disability benefits under 28 U. S. C. § 351 because of the hearing loss. Kubrick had only a twelfth grade education, no medical training, and had relied on the representations of his physician that his hearing loss was due to the Neomycin; and submitted this information in support of his claim to the Veterans Administration.

In August, 1967, the VA Board of Physicians denied the claim. The physicians, in direct contradiction of Dr. Sataloff, concluded that there was no causal connection between the Neomycin therapy and the hearing loss. The Board also declared that there was no evidence of carelessness, error of judgment or lack of proper skill on the part of the VA. The VA officials and physicians, sitting in judgment of Kubrick's case, from 1969 until its final denial of Respondent's claim in April 1973, consistently and

tenaciously held to its position that there was no negligence on the part of VA doctors, and that there was no causal connection between the use of Neomycin on the Respondent and his hearing loss.

A VA adjudication officer advised Kubrick in September, 1969, in consonance with earlier VA appraisals of his condition, that Respondent's claim had been denied because his hearing loss was not attributable to VA treatment. Mr. Kubrick filed a "Statement in Support of Claim" on September 25, 1969, in response to which the VA again negated a causal connection between the Neomycin irrigation and the Respondent's hearing impairment. After Respondent received statements from a hearing specialist and from the Public Health Service, that Neomycin could be ototoxic, he wrote to various public officials entreating them to help him obtain disability benefits. Again, as they had done repeatedly before, the VA denied a causal connection between the administration of the Neomycin and Kubrick's deafness.

From January 13, 1970 until February 16, 1970, Kubrick was hospitalized at the Veterans Hospital in Wilkes-Barre. An extensive audiometric examination was conducted and the examination revealed that Mr. Kubrick suffered from severe bilateral sensoneural hearing loss which foreclosed speech discrimination, and that a hearing aid would be useless for his condition.

In May, 1971, the Veterans Administration sent Respondent a copy of a field investigation report, which purported to contain an interview with Dr. Soma, a physician who had seen Kubrick soon after his leg operation. The report stated that Dr. Soma believed Respondent's problems stemmed from his employment in a machine shop. Kubrick confronted Dr. Soma with the report on June 2, 1971. Not only did Dr. Soma deny the report, but he told

Respondent that in his opinion the Neomycin was the sole cause of the veteran's hearing disability, and that the Neomycin medication should never have been used. As a final blow, after Kubrick's discussion with Dr. Soma, the Board of Veterans Claims denied Respondent's claim on August 9, 1972. It is important to note that subsequent to the commencement of suit in this case, the Board of Veterans Claims finally reversed itself and found that there was sufficient proof of causal connection between the administration of Neomycin and Kubrick's hearing loss; and awarded him further disability benefits based upon the hearing loss.

Following a lengthy bench trial, Judge Becker found that the government was liable and awarded damages of $320,536.00. The Court of Appeals for the Third Circuit, in a unanimous decision, affirmed the trial court on the crucial issues of the statute of limitations, negligence, causation and on all damage issues except for a set off involving the increased VA disability benefits for which a remand was ordered to allow for recalculation of damages.

A Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit was filed on December 21, 1978.

ARGUMENT.

The sole issue before this court is the question of the application of the Statute of Limitations. No argument is presented by the Petitioner on the questions of malpractice or causation.

An action under the Federal Tort Claims Act is barred within two years after the "claim accrues" 28 U. S. C. 2401(b). Where an act of malpractice is not immediately apparent to the victim, the Circuit Courts have uniformly held that a claim accrues when the victim "discover[s] or in the exercise of reasonable diligence should have discovered the acts constituting the alleged malpractice." [1]

This rule was formulated in the case of *Quinton v. United States*, 304 F. 2d 234, 240 (5th Cir. 1962). The Quinton rule was derived from a landmark decision of this Court in *Urie v. Thompson*, 337 U. S. 163 (1949). In Urie, a railroad employee's claim under the Federal Employer's Liability Act was not ruled to be time-barred even though it was not apparent when he contracted the silicosis that prevented him from working. While the court found the condition may have begun any time between 1910 and 1940, plaintiff was not charged with being aware of the

1. 29 ALR Fed. 482, § 6 and cases cited therein including *Toal v. United States*, 438 F. 2d 222 (2nd Cir. 1971); *Tyminski v. United States*, 481 F. 2d 257 (3rd Cir. 1973); *Ciccarone v. United States*, 486 F. 2d 253 (3rd Cir. 1973); *Portis v. United States*, 483 F. 2d 670 (4th Cir. 1973); *Bridgford v. United States*, 550 F. 2d 982 (4th Cir. 1977); *United States v. Reid*, 251 F. 2d 691 (5th Cir. 1958); *Quinton v. United States*, 304 F. 2d 234 (5th Cir. 1962); *Beech v. United States*, 345 F. 2d 872 (5th Cir. 1965); *Jordan v. United States*, 503 F. 2d 620 (6th Cir. 1974); *Cooper v. United States*, 442 F. 2d 908 (7th Cir. 1971); *Reilly v. United States*, 513 F. 2d 147 (8th Cir. 1975); *Hungerford v. United States*, 307 F. 2d 99 (9th Cir. 1962); *Brown v. United States*, 353 F. 2d 578 (9th Cir. 1965); *Dulaine v. United States*, 371 F. 2d 824 (9th Cir. 1967) cert. den. 387 U. S. 920, 18 L. Ed. 2d 973, 87 S. Ct. 2034, reh. den. 389 U. S. 890, 19 L. Ed. 200, 88 S. Ct. 18; *Ashley v. United States*, 413 F. 2d 490 (9th Cir. 1969); *Casias v. United States*, 532 F. 2d 1339 (10th Cir. 1976).

condition until 1940, when he became incapacitated. Deciding that dismissal of the action because the statute of limitations had expired would be unconscionable, this Court said, "We do not think that the humane legislative plan intended such consequences to attach to blameless ignorance." *Id.* at 170.

In many situations, in order to discover an act of malpractice, the plaintiff need be aware only of the causation and the damages. In those instances, the fact of negligence necessarily follows from that knowledge.[2] Even a layman can deduce negligence from certain instances of cause and effect.

In other circumstances, however, the plaintiff may still be blamelessly ignorant even where the causation and the damage are known or suspected by him. Those situations require a different approach, in order to eschew the result that the Urie court sought to avoid by propounding the blameless ignorance doctrine.

As a further refinement to the Quinton and Urie doctrines, the courts have developed a four-pronged test in situations where the two-pronged test is inadequate to prevent manifest injustice due to blameless ignorance. Under the test the plaintiff's cause of action accrues when he becomes aware of four elements, (1) causation, (2) damage (3) duty of care by the physician and (4) breach of the duty of care. The courts apply the four-pronged test when causation and damages are known by the plaintiff but other factors impede the plaintiff from understanding that such causation and damages are related to malpractice. The four-pronged test has been applied

2. *Brown v. United States, supra,* (where oxygen caused brain damage in an infant); *Richter v. United States*, 551 F. 2d 1177 (9th Cir. 1977) and *Hammond v. United States*, 388 F. Supp. 928 (E.D. N.Y. 1975) (where polio shots caused polio); *Reilly v. United States, supra,* (where the use of a mechanical respirator caused plaintiff to completely lose her voice).

where the plaintiff has been hindered from discovery of negligence because of the misrepresentations of physicians,[3] and where the injury and the causation are so technically complex that it is not apparent that the ultimate cause was negligence.[4]

In the instant case, both exceptions to the two-pronged test are present; therefore, the four-pronged test was appropriately applied by the trial court. The Government itself, through the Veterans Administration, repeatedly and consistently told the Respondent from 1969 until 1973 that there was no malpractice and that there was no causal connection between Neomycin and his injury. The Government, at page 9 of its Petition to this Court, states "Perhaps there would be an argument for tolling the Statute [28 U. S. C. 2401(b)] if there were some impediment to obtaining such advice."

Clearly, there were impediments to Mr. Kubrick's determining that his treatment was negligent—the Veterans Administration Claims Board, and the Board's physicians and investigators. A layman like Kubrick, with no special medical knowledge, could easily conclude that there was neither causation nor malpractice as a result of representa-

3. *Jordan v. United States, supra,* (where doctors in an apparent cover-up, represented to plaintiff that his loss of vision resulting from an operation was attributable to the seriousness of his sinus condition, rather than malpractice during the operation). *Bridgford v. United States, supra,* (where doctors told the plaintiff that they had mistakenly cut a vein but that it had been repaired; and where doctors attributed Bridgford's further complaints to emotional causes). *Exnicious v. United States,* 563 F. 2d 418 (10th Cir. 1977) (where physicians informed plaintiff he was suffering from degenerative arthritis, when he was actually suffering from necrosis).

4. *Portis v. United States, supra,* (where the plaintiff's hearing loss was caused by the intravenous administration of neomycin). *Exnicious v. United States, supra,* (where plaintiff's shoulder disability, necrosis, was caused by his being operated on, while he had a streptococcal infection).

tions made to him by the Veterans Administration. The "different rule," as the Government refers to the four-pronged test in their brief at page 12, is necessary in cases such as the instant one, where an innocent layman is misled by an array of medical experts.

The medical causation of Respondent's injury is highly technical and complex and is a further reason for the four-pronged test's application.

The Government seeks to distinguish some Eighth and Ninth Circuit cases from the case at bar and set up an argument based upon a conflict between the circuits. *Brown v. United States, supra, Ashley v. United States, supra, Reilly v. United States, supra,* and *Hulver v. United States,* 562 F. 2d 1132 (8th Cir. 1977), all apply the two-pronged test. The application is factually warranted and isolated to the circumstances of each case. In all of these cases, the injury that resulted was either apparently malpractice even to a layman or the plaintiff was warned against the procedure in question because it could cause the resulting harm. All of the aforementioned Eighth and Ninth Circuit cases rely on the principle, also relied upon the Third Circuit here, that there must be enough information "to alert a reasonable person that there may have been negligence for which the complaint was subsequently made." *Ashley v. United States, supra,* at 493. There was enough in *Ashley, Brown, Reilly* and *Hulver,* that just by knowing causation and damage, the plaintiff should have been alerted that there was negligence. The determination made in the instant case was that there was not enough, just by looking at causation and damages, to alert a reasonable layman to conclude that there was negligence.

The Tenth Circuit applied both the two-pronged and four-pronged tests, consistently with the theory of this rebuttal to the Petition. The two-pronged test was applied in *Casias v. United States, supra,* where, as a result of

injections after a tonsillectomy, Casias' left leg became paralyzed. The same court in a more complex situation, *Exnicious v. United States, supra*, utilized the four-pronged test. There, government doctors misdiagnosed Exnicious' shoulder disability as arthritis. Exnicious later found out it was necrosis caused by his being operated on while he had a streptococcal infection. Exnicious was, like the Respondent here, both misinformed and misfortunate enough to have a condition that was causally technically complex.

In essence there is no conflict between the circuits worthy of having this court accept the instant Petition—what we have are simply different standards based upon different factual situations.

The Government warns of masses of litigation flowing from the decision in this case; this alarm is without substance. The broader test is only applied in situations where there are either misrepresentations or technically complex medical conditions, both of which are a rarity. In any case, a plaintiff, who is misfortunate enough to either have a technically complex injury or be hindered in his determination of the causation and possible malpractice involved in his injury should not be precluded from recovery. Blameless ignorance as a bar to suit is what this Court has ordered the lower courts to avoid.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 22, 1979.

No. 78-1014

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM A. KUBRICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1014

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM A. KUBRICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 581 F.2d 1092. The opinion of the district court (Pet. App. 15a-70a) is reported at 435 F. Supp. 166.

JURISDICTION

The judgment of the court of appeals (Pet. App. 71a) was entered on July 27, 1978. A motion to

amend the opinion was denied on September 13, 1978 (A. 12). On October 16, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 24, 1978, and on November 14, 1978, he further extended the time to and including December 24, 1978. The petition was filed on December 21, 1978, and granted on February 21, 1979 (A. 145). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a claim for medical malpractice under the Federal Tort Claims Act "accrues" when the claimant knows both the existence and cause of the injury, even if he does not know that the infliction of the injury amounted to negligent medical practice.

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

2. 28 U.S.C. 2675(a) provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, crossclaim, or counterclaim.

STATEMENT

1. Respondent was admitted to a Veterans Administration hospital in April 1968 for treatment of an infection in his right femur. After surgery the infected area was irrigated continuously for 12-13 days with a solution of the antibiotic neomycin sulfate (Pet. App. 15a). In June 1968 respondent noticed a ringing in his ears and some loss of hearing (*id.* at 23a). His family physician referred him to a private ear specialist, who diagnosed his condition in August 1968 as bilateral nerve deafness (*ibid.*). In November 1968 respondent consulted another ear specialist, Dr. Joseph Sataloff, who requested VA records to determine whether respondent had received any drug during his hospitalization that could have caused a

hearing loss (*id.* at 23a-24a). On January 10, 1969, after examining the VA's records, Dr. Sataloff told respondent that the VA's administration of neomycin probably had caused his hearing loss.[1]

Respondent already was receiving VA disability benefits for a service-connected back injury. In April 1969 he applied for an increase in those benefits pursuant to 38 U.S.C. 351,[2] alleging that the administration of neomycin by a VA surgeon had caused his hearing loss (A. 7). Respondent's application stated that the basis of his claim was a "bilateral defective

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[1] Respondent testified (A. 68) that Dr. Sataloff told him that his hearing loss "could possibly be caused by the drug neomycin" (A. 68). Dr. Sataloff testified that he had "a note that I told [respondent] that it was neomycin that caused his hearing loss" (A. 131). He later wrote to the VA that there "is a very excellent possibility" (A. 132) that the administration of neomycin caused the deafness. The district court declined to credit Dr. Sataloff's testimony that he had given respondent a firm opinion that the neomycin caused the deafness. The court found "that Dr. Sataloff told [respondent] and reported to the Veterans Administration, insurance companies, and others that it was his opinion that it was 'highly possible' (or other similar language) that the hearing loss was caused by the neomycin solution" (Pet. App. 24a).

[2] 38 U.S.C. 351 provides that a veteran is entitled to disability benefits "in the same manner" as if such disability "were service-connected" in the event that he suffers "an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment" administered by the VA. Under the implementing regulations, 38 C.F.R. 3.358 (c) (3), an applicant for benefits must show that "the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgement, or similar instances of indicated fault on the part of the Veterans Administration."

hearing condition [that was] the result of medication proscribed [*sic*] during my period of hospitalization" (A. 7). He identified Dr. Sataloff as his authority for stating that his hearing loss was attributable to the treatment (*ibid.*). A medical board reviewed the application in August 1969, stating that neomycin was known to cause deafness only when administered "systemically," not when administered to a discrete wound (A. 13). Administration of neomycin of the kind used in petitioner's case was "common practice at this hospital * * * and adverse reactions are unknown" (A. 13). Consequently, the VA medical board's report concluded, there is "no evidence of carelessness, accident, negligence, lack of proper skill, error in judgment, or any other fault on the part of the government" (A. 14). Respondent was notified by a letter dated September 5, 1969, from an Adjudication Officer in the VA's Philadelphia office that his claim was disallowed because it had been determined that the hearing loss he alleged "is not medicinally or medically attributable to" his VA hospitalization (A. 15). Respondent later testified that this letter "meant * * * that the decision made a mistake" and that he "assumed it was * * * a medical error [because] * * * the neomycin did cause my hearing loss" (A. 74).

On September 25, 1969, respondent filed another statement in support of his claim for disability benefits. This statement asserted that the neomycin caused his deafness, explaining that he had been informed by Dr. Sataloff that "the medication * * * was definately [*sic*] responsable [*sic*]" for his loss of hearing

(A. 8-9). The VA sent respondent a "Statement of the Case" dated September 26, 1969 (A. 16-20) and a confirmation of the denial of his claim dated September 29, 1969 (A. 21-22). These documents were to be used by respondent as aids in completing his appeal (A. 16). The VA stated once again that "the topical use of neomycin in solution in the irrigation process is medically acceptable and proper following surgery" (A. 22) and that the "package literature" (a summary of a drug's effects that the FDA requires to be provided to physicians) stated that hearing loss occurred only after systemic use of neomycin (A. 19, 22). Respondent's treatment did not involve systemic use of the drug, it was maintained (A. 19, 22). The September 29 decision reiterated that no "carelessness, accident, negligence, lack of proper skill, error in judgment or other instance of indicated fault on the part of the Veterans Administration" had been shown and reaffirmed the decision of September 5 (A. 22).

In December 1969 respondent, pursuing an administrative appeal, sent the VA a six-page statement titled "Disagreement of Facts of the Issue," in which he took issue with the VA's "Statement of the Case" (A. 83-84, 117-126). One point of contention was the question whether deafness, which the package literature warned could result from systemic use of neomycin, also could result from using the drug to irrigate a wound. Respondent asserted (A. 121):

> There is also a difference of opinion in the statement about the adverse reaction mentioned on the packaged [*sic*] literature. It has been found, depending on quantities used to irrigate, definitely possible that hearing loss can occur and be directly caused by [*sic*] if enough high blood level of the drug was reached.

The Board of Veterans Appeals remanded the case for consideration of further evidence (A. 23-28). Following the remand the Board summarized the history of the case and concluded that "the defective hearing may have been caused by the neomycin irrigation" (A. 47). The Board also concluded, however, that the neomycin was administered "in accordance with acceptable medical practices and procedures" (A. 47). Accordingly, on August 9, 1972, the Board affirmed the denial of the claim (A. 47-48).

While his case was pending before the VA, respondent and his wife wrote letters to various VA officials and to United States Senators protesting the denial of his claim and contradicting the VA's initial finding that there was no causal connection between the use of neomycin and his deafness (Pet. App. 4a, 28a, 28a-29a n.3). In a letter to Donald Johnson, Administrator of the VA, dated October 15, 1970, respondent admonished the Administrator: "Please keep in mind I have already gone through much, when I lost my Hearing as a result of a Medical Error, whether or not the Veterans Administration cares to recognize the truth even after being presented with evidence from the most competent sources" (A. 10). Respondent and his wife also consulted medical reference sources on neomycin (A.

121-122) and solicited the opinions of physicians and drug specialists on the ototoxic properties of neomycin. They received responses indicating disagreement with the VA's statements that neomycin is safe when used as an irrigating solution (A. 35, 81, 106).

In May 1971 the VA sent respondent a "Supplemental Statement of the Case," which contained a report stating that Dr. J. J. Soma, the first private ear specialist he had consulted, had suggested to a VA field examiner that respondent's deafness was related to his previous occupation as a machinist (Pet. App. 26a-27a; A. 90). In June 1971, when respondent questioned him, Dr. Soma denied making the statement and further told respondent not only that the neomycin had caused his deafness but also that it should not have been administered (*ibid.*). Several weeks later, on the advice of another ear specialist, respondent consulted an attorney (Pet. App. 5a). The district court found that respondent "did not, prior to his June 1971 interview with Dr. Soma, suspect that there was negligence involved" (Pet. App. 29a).

2. Respondent filed this Federal Tort Claims Act suit in September 1972, alleging that he had been injured by negligent treatment in the VA hospital (Pet. App. 5a; A. 5-6). He filed his administrative tort claim with the VA on January 13, 1973 (Pet. App. 30a).[3] The VA rejected the claim as untimely.

[3] According to 28 U.S.C. 2675(a), a suit may not be brought under the Act unless a tort claim has been filed in writing with the agency concerned and the agency has either denied

In court, the United States denied negligence and also defended on the ground that the suit was barred because an administrative claim had not been filed with the agency within the Act's two-year limitations period, 28 U.S.C. 2401(b), which begins running when the claim "accrues."[4]

Following a trial the district court found that the neomycin treatment had caused respondent's deafness (Pet. App. 32a-41a), that the treatment constituted medical malpractice (*id.* at 62a-69a), and that respondent's claim is not time-barred (*id.* at 47a-61a). It entered judgment for respondent in the amount of $320,536 (Pet. App. 72a).

In arguing that the claim was not timely filed, the government had contended that respondent's claim

it or failed to rule on it within six months. (The two-year limitations period set by 28 U.S.C. 2401(b) is keyed to the filing of the administrative claim.) The government objected to the premature filing of the suit, but the district court found the objection moot when the VA denied the claim on April 13, 1973. Because respondent could have simply re-filed in April, and the suit still would have been timely under the district court's view of the statute of limitations, the government chose not to raise the issue on appeal.

[4] The claim filed by respondent seeking enhanced VA benefits was not an administrative claim for purposes of the Tort Claims Act because it did not allege negligent conduct or seek a sum certain as damages. Respondent has never argued that his 1969 claim with the VA, or the subsequent proceedings, may be treated as a claim under the Tort Claims Act. Respondent had independent rights, and resort to one did not toll the time within which to resort to the other. *Electrical Workers* v. *Robbins & Myers Inc.*, 429 U.S. 229 (1976); *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). See also note 15, *infra*.

accrued at the latest in April 1969, when his application for disability benefits demonstrated that he knew there was a causal connection between the neomycin treatment and his deafness. In rejecting the government's argument, the district court held that respondent's claim did not accrue until June 1971, when Dr. Soma told him that the use of neomycin had been improper (Pet. App. 61a). The court held "that where the patient perceives the relationship between treatment and injury but, notwithstanding diligence, has no reason to believe that there was any negligence in the treatment, the statute does not begin to run" (*id.* at 50a-51a). The government appealed from the ruling on the statute of limitations issue.

3. The court of appeals affirmed in substantial part.[5] The court began its discussion with the generally accepted rule of *Quinton* v. *United States*, 304 F.2d 234, 240 (5th Cir. 1962), that "a claim for malpractice accrues against the government when the claimant discover[s], or in the exercise of reasonable diligence, should have discovered, the acts constituting the alleged malpractice." It observed that in most

[5] It remanded on one issue. In 1975 the VA reversed its earlier decision and awarded respondent an increase in disability benefits (A. 51-56). The court of appeals held that the increase in disability benefits must be deducted from the damages awarded in tort. The case was remanded for a reduction of the judgment (Pet. App. 14a). Under the terms of 38 U.S.C. 351, if the judgment for respondent is upheld, the increment in future monthly VA benefits attributable to his hearing disability cannot be paid to him "until the aggregate amount of benefits which would be paid but for this [provision] equals the total amount included in such judgment * * *."

cases knowledge of the causal connection between a particular treatment and injury should alert a reasonable person to the possibility of an "actionable wrong," but it stated that in a "few instances" knowledge of such a nexus would not be sufficient to suggest to a reasonable person the possibility that the treatment was improper (Pet. App. 10a). In those cases, according to the court of appeals, the limitations period is tolled (*ibid.*).

The court stated that subjective as well as objective standards must be applied to determine when the claim accrues. Thus, for example, the training and relative sophistication of the plaintiff could be considered in determining whether he was on notice of possible negligence. The factors that led the court to conclude that respondent's claim did not accrue until the 1971 conversation with Dr. Soma were the technical complexity of the question whether the neomycin treatment was excessively risky, the failure of physicians to suggest before 1971 that there had been negligence, and the VA's denials of causation when respondent sought increased disability benefits for his hearing loss (Pet. App. 11a).

The court of appeals acknowledged that as early as 1969 respondent had written letters arguing that the neomycin treatment was mistaken, but it concluded that the district court was not clearly in error in finding that respondent had been referring to the VA's denial of additional benefits rather than to malpractice (Pet. App. 11a-12a). The court concluded that respondent did not know and could not

be expected to know that administration of the drug was "medical negligence" until that conclusion was suggested by a physician. In summing up the basis for its holding that the claim did not accrue until June 1971, the court stated (Pet. App. 12a):

> * * * Thus, [respondent] knew [in 1969] two of the essential elements of a possible cause of action—causation and damages—but he did not know, nor could he reasonably have been expected to know, according to the district court's findings, of the breach of duty on the part of the government. In these circumstances, the limitation period did not run until Dr. Soma's conversion suggested a duty had been breached by the Veterans Administration.

SUMMARY OF ARGUMENT

A tort claim against the United States must be filed "within two years after [the] claim accrues." 28 U.S.C. 2401(b). A tort claim usually "accrues" on the date of the tortious acts. When a tort produces hidden injury, however, the claim usually "accrues" when the injury becomes manifest and its cause is or should be identified. *Urie* v. *Thompson*, 337 U.S. 163, 168-171 (1949). The court of appeals here amended this "causal connection" approach by adding another requirement: the injured person must know that the act causing the harm could be characterized as "negligent." In the present case this additional requirement postponed the "accrual" of the claim by almost three years, to the date when a physician bluntly told respondent that the treatment he had received was medical malpractice.

This holding subverts the purpose of the statute of limitations. It rests on the assumption that a statute of limitations does not begin to run until a prospective plaintiff's investigation of the injury is so far advanced that he could file suit almost immediately. But statutes of limitations are designed to induce prospective plaintiffs to investigate and act; they are not designed to offer a period of leisure between the completion of an investigation and the filing of suit. Statutes of limitations can achieve their purposes only if they start to run once a person knows, or should know, that he has been harmed. Knowledge of the existence and cause of harm marks the place at which investigation of the claim can begin. The aggrieved party then is in a position to consult with physicians, attorneys, and other advisers, and to file suit if necessary. The statutory period sets a limit on the length of this investigation and deliberation. Congress established two years as the appropriate time. Respondent, after learning of both the harm and its cause, took four. That was two too many.

The legislative history of the Federal Tort Claims Act shows that Congress intended the period of limitations there to serve the traditional function. The committee reports stated Congress' concern that claims be filed before they become stale and evidence becomes difficult to assemble. When Congress later extended the limitations period to its current length, the committee reports strongly implied that a claim accrues on the date of the tortious acts, even if the

harm is not discovered until some time later. The legislative history thus demonstrates that the date of "accrual" should not lightly be postponed. Indeed, postponement is particularly inappropriate where, as here, this Court must interpret a statute that waives the sovereign immunity of the United States. Such statutes traditionally have been construed in favor of the government.

The rule that a malpractice claim "accrues" when the victim knows that he has been harmed by a particular medical treatment is not unfair. The limitations period does not begin to run until the potential plaintiff learns (or should have learned) the connection between a known harm and the acts producing it. The two years following this discovery of the causal connection are ample to investigate, obtain medical and legal assistance, and file an administrative claim. The rule for which we argue does not penalize blameless ignorance; it simply encourages prompt investigation and action, which any statute of limitations should do.

The fact that a medical malpractice case may be complex is not a reason for deferring the accrual of the claim. Congress presumably took the complexity of some tort cases into account in setting the limitations period at two years rather than some shorter time. A court cannot properly rely on the complexity of a particular case to extend the period.

Moreover, the court of appeals' suggestion that the VA's denials of liability postponed the accrual of the claim is unwarranted. Many persons charged with tortious conduct will deny blame. Unless the denial

contains misleading or false information that confuses or lulls a victim, it should not toll the statute. Nothing the VA said confused or lulled respondent.

Finally, the district court's observation that respondent diligently prosecuted a claim before the VA for an increase in disability benefits is irrelevant. Pursuit of one remedy does not extend the time in which to invoke another. *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976).

In sum, the court of appeals' interpretation of the statute of limitations undermines its reason for being. If respondent's claim is timely, many future litigants will be substantially unconstrained by the statute so long as they do not vigorously pursue their claims or ask the right questions of the right people. Such a rule, which makes sleeping on one's rights a reason for extending the time within which to file a claim, is incompatible with the history and purposes of the Federal Tort Claims Act.

ARGUMENT

A CLAIM FOR MEDICAL MALPRACTICE UNDER THE FEDERAL TORT CLAIMS ACT "ACCRUES" WHEN THE CLAIMANT KNOWS BOTH THE EXISTENCE AND CAUSE OF THE INJURY, EVEN IF HE DOES NOT KNOW THAT THE INFLICTION OF THE INJURY AMOUNTED TO NEGLIGENT MEDICAL PRACTICE

A. The Rule for Accrual of a Claim Should Encourage Prompt Investigation and Action

A tort claim against the United States is "forever barred unless it is presented in writing to the appropriate Federal agency within two years after

[the] claim accrues." 28 U.S.C. 2401(b). The Act specifies no standard for determining when a claim "accrues." The traditional rule is that a claim accrues on the date that all of the elements giving rise to the right to recover have come into existence. In the case of most torts this is the date on which actual harm is produced by a wrongful act. *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1200-1201 (1950); W. Prosser, *Handbook of the Law of Torts* 177-178 (1941). The traditional rule is obviously appropriate with regard to actions, such as most personal injury suits, in which the wrongful act and resulting harm are almost simultaneous and the causal connection therefore immediately evident.

As this Court held in *Urie* v. *Thompson*, 337 U.S. 163, 168-171 (1949), however, a different rule is appropriate in cases in which the harm from the wrongful act is hidden for some time. So long as the harm is not manifest, the victim could not be expected to be concerned or to have any basis for redress. Even though a right of recovery sometimes may be available as soon as a wrongful act has occurred, the claim should not "accrue" for the purpose of a limitations provision until the victim knows, or can be expected to know, that an act or acts caused him harm. *Ibid.*

Quinton v. *United States*, 304 F.2d 234 (5th Cir. 1962), held that the *Urie* rule applies to medical malpractice claims under the Federal Tort Claims Act. According to *Quinton*, a malpractice claim against the United States accrues when the victim

"discover[s], or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice." 304 F.2d at 240. We understand this to mean that an administrative claim must be filed within two years after the victim discovers or should have discovered (a) that he suffered harm, and (b) the cause of the harm. We accept the rule, as so understood, as the proper one for malpractice claims under the Act.[6]

The court of appeals in the present case added a third element to the formula—knowledge that the act causing the harm may be characterized as medical negligence.[7] Although the court purported to limit its

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[6] Because the date on which the two years begins to run depends on the construction of a federal statute, it raises a question of federal law. Only the First Circuit looks to state law to determine the time at which the claim accrues. See *Hau* v. *United States*, 575 F.2d 1000, 1002 & n.2 (1st Cir. 1978) and cases there cited; *DeWitt* v. *United States*, 593 F.2d 276 (7th Cir. 1979); *Exnicious* v. *United States*, 563 F.2d 418, 420 n.6 (10th Cir. 1977); *Sanders* v. *United States*, 551 F.2d 458, 460 (D.C. Cir. 1977); *Reilly* v. *United States*, 513 F.2d 147, 148 (8th Cir. 1975).

[7] The *Quinton* approach—without the Third Circuit's elaboration—became the generally accepted rule. Until 1977, decisions applying *Quinton* either stated or were consistent with the view that the claim accrues as soon as the victim knows or should know both the existence of harm and the cause of that harm. See, *e.g.*, *Caron* v. *United States*, 548 F.2d 366 (1st Cir. 1976) (claim accrued when harm became apparent and cause was diagnosed years after the treatment); *Kossick* v. *United States*, 223 F. Supp. 720, 721 (S.D.N.Y. 1963), aff'd, 330 F.2d 933 (2d Cir.), cert. denied, 379 U.S. 837 (1964) (claim barred); *Toal* v. *United States*, 438 F.2d 222 (2d Cir. 1971) (paraplegia from post-operative bleeding initially confused with consequences of congenital spine

discovery rule to special circumstances, the limitations are illusory and the rule itself improper. Al-

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tumor; claim accrued when confusion was dispelled); *Portis* v. *United States*, 483 F.2d 670 (4th Cir. 1973) (claim accrued under same circumstances as *Caron*); *Reilly* v. *United States*, 513 F.2d 147 (8th Cir. 1975) (claim barred); *Hulver* v. *United States*, 562 F.2d 1132 (8th Cir. 1977), cert. denied, 435 U.S. 951 (1978) (claim barred); *West* v. *United States*, 592 F.2d 487 (8th Cir. 1979) (claim barred); *Hungerford* v. *United States*, 307 F.2d 99 (9th Cir. 1962) (claim barred); *Brown* v. *United States*, 353 F.2d 578, 580 (9th Cir. 1965) (claim barred); *Ashley* v. *United States*, 413 F.2d 490 (9th Cir. 1969) (claim barred). In *Quinton* itself the Court of appeals held that a claim arising out of a woman's inability to bear a child, caused by improper blood transfusions given in 1956, accrued in June 1959, when during the woman's pregnancy the consequences of the transfusion first became apparent. 304 F.2d at 235.

Since 1977, however, several courts have announced that the period of limitations does not begin to run until the claimant has a "reasonable opportunity" to discover "duty, breach, causation, and damages." The courts following this approach have treated knowledge of "breach" as knowledge that the complained-of acts were tortious. These cases therefore announce a rule similar to the approach of the Third Circuit here. See *Bridgford* v. *United States*, 550 F.2d 978 (4th Cir. 1977); *DeWitt* v. *United States*, *supra*; *Exnicious* v. *United States*, *supra*, 563 F.2d at 420. Whether or not these cases were correctly decided on their facts, the test they announce is fundamentally inconsistent with the approach followed by the cases cited in the previous paragraph. (The rule in the Sixth Circuit is unclear. Although *Jordan* v. *United States*, 503 F.2d 620, 624 (6th Cir. 1974), appears to use language similar to that of the Third Circuit, and was relied on by the court of appeals here (Pet. App. 8a-10a), the case may be more properly understood as one in which the claimant did not know the cause of his injuries for some time, and filed a claim within two years of learning the cause. See *Casias* v. *United States*, 532 F.2d 1339 (10th Cir. 1976), which gives *Jordan* this reading.)

though we discuss below the principles of statutory construction and the legislative history that support our position, the principal objection to the court of appeals' holding is that its approach is at odds with the reasons for having a statute of limitations.

Statutes of limitations are designed to induce prospective plaintiffs to investigate possible claims promptly and to sue before evidence becomes stale and memories fade. Statutes of limitations can achieve these purposes only if they start to run once a person knows, or should have known, that something is amiss. The knowledge of harm and the identity of its source marks the place at which investigation can begin. The aggrieved person can consult physicians, attorneys, and advisers of all sorts. The system of notice pleading and liberal discovery implemented by the Federal Rules of Civil Procedure allows still further investigation after a suit has been filed. The statutory period of limitations establishes how much of this investigation should be permitted before suit (or, under the Tort Claims Act, an administrative claim) is filed. Congress chose two years as the appropriate period under the Tort Claims Act. Respondent, after learning of both the harm and its cause, took four. That was two too many.

The court of appeals appears to have assumed that the period of limitations is not a time for investigation. It is, in the court's view, a time for repose. Nothing else can explain the court of appeals' conclusion that the time does not even begin to run until the prospective plaintiff knows everything necessary

to file suit—he must know not simply that he has been harmed, and by whom, but that a physician (and perhaps an attorney?) considers the harm actionable on the basis of thoroughly-investigated facts. Application of the rule in this case meant that respondent was rewarded with two additional years' time because he never put to the many physicians he consulted the plain question: "Was the treatment negligent?" Neither the district court nor the court of appeals concluded that respondent *could* not have obtained a physician's answer to that question during the two years after he learned the cause of his deafness; it was enough, they held, that he *did* not. This effectively means that the running of a statute of limitations may be suspended because a potential plaintiff was careless or inefficient in the investigation of his claims, the very thing that the period of limitations is designed to prevent. The court of appeals' approach reduces the incentive for a potential plaintiff to obtain medical or legal advice; rather than going to physicians, future victims can wait for physicians to come to them.

B. The Nature of the Federal Tort Claims Act as a Waiver of Sovereign Immunity and the Legislative History of Its Limitations Provision Show That the Claim Accrues When the Connection Between the Act and the Harm Is Established

The Federal Tort Claims Act creates a right of recovery against the United States and waives sovereign immunity to a specified extent. Because only Con-

gress can waive sovereign immunity, a court cannot excuse noncompliance with any provision of the Tort Claims Act. Each is a precondition to recovery. *Munro* v. *United States*, 303 U.S. 36, 41 (1938).[8] Moreover, because the limitations provision in 28 U.S.C. 2401(b) is a condition of the government's waiver of sovereign immunity, its terms "must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). See also *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 590-591 (1941). A court, of course, must interpret the statutory language in determining when the limitations period began to run in a particular case, but this process of interpretation is guided by the rule of strict construction. A court surely is not free to invent a definition of "accrual" that is at odds with the legislative history of the Act. Yet that is what the court of appeals has done.

The statute of limitations was enacted in 1946 as part of the original version of the Tort Claims Act. 60 Stat. 845. It set the limitations period at one year from the date of a claim's accrual. The legislative history does not indicate that Congress considered how to determine when a claim accrues or whether the time of accrual might depend on the nature of the

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[8] See also Gottlieb & Young, *Medical Malpractice and the Limitations Under the Federal Tort Claims Act*, 13 Def. L.J. 257, 262-263 (1964); *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1187-1188 (1950).

claim asserted.[9] It is clear, nevertheless, that by including the provision Congress sought to achieve purposes that limitations periods traditionally have been understood to serve.

Limitations periods commonly are employed to induce potential plaintiffs to pursue their remedies promptly or not all; to spare courts the burden of adjudicating, and defendants the burden of litigating, stale (and possibly fraudulent) claims regarding which relevant evidence may have become more difficult to obtain; and to protect society's reasonable expectations that events long past will not be resurrected as the basis for claims that may disrupt the orderly planning of daily affairs. As this Court explained shortly before Congress enacted the Tort Claims Act (*Order of Railroad Telegraphers* v. *Ry. Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944)):

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

[9] The Senate Report on S. 2177, 79th Cong., 2d Sess., (1946), the Legislative Reorganization Act of 1946, which contained the provisions that became the Federal Tort Claims Act, offers only a paraphrase of the provision that sheds no light on the meaning of the term "accrued." S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946). The Federal Tort Claims Act was conceived as an element of the legislative reorganization plan because it removed from Congress the burden of enacting private bills to provide relief for citizens with tort claims against the government. *Id.* at 7; *Feres* v. *United States*, 340 U.S. 135, 140 (1950).

See also *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554 (1974).

Similar concerns were expressed in Congress during deliberations on tort claims bills preceding the one finally enacted. Short limitations periods were urged, for example, as necessary to assure that relevant evidence would be sufficiently fresh to permit the detection of fraudulent claims. See, *e.g.*, H.R. Rep. No. 2800, 71st Cong., 3d Sess. 5 (1931); *Hearings on H.R. 5065 Before the Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 14 (1932). Moreover, in commenting on a six-month notice requirement in S. 1912, 69th Cong., 1st Sess. (1926), a sponsor of that bill explained the special need for such a provision where government activities are the basis for suits:

> The trouble in so many of these governmental claims is that if you extend the period longer than the proposed six months, the witnesses to the accident have all gone. For instance, in the War and Navy Departments they are transferred to the Philippines or to some distant post and consequently can not be secured to appear before the court or appear before the commission. In the Post Office Department, with its

> constantly shifting employment from one city to another you find that the same thing occurs.

67 Cong. Rec. 11087 (1926) (remarks of Rep. Underhill).

Although Congress prescribed a longer limitations period in the statute enacted in 1946, and in 1949 extended that period to two years (63 Stat. 62), it did not abandon its concern for the purposes served by the limitations provision. *Pittman* v. *United States*, 341 F.2d 739, 741 (9th Cir. 1965), cert. denied, 382 U.S. 941 (1965). The House Report on the proposed amendment explained that the extension to two years would make the federal limitations period equal to the average length of limitations periods applicable to tort actions in state courts. (H.R. Rep. No. 276, 81st Cong., 1st Sess. 2-3 (1949)); it defended this length as a "happy medium" that would not "foster a lack of diligence on the part of claimants in the prosecution of their claims" (*id.* at 4). It disclaimed any intent to "harass the Federal agencies in their defense against such suits by increasing the difficulty of their procurement of evidence." *Ibid.*

There is no indication that the committee issuing the 1949 report considered how to determine when a claim accrues, but the report seems to assume that a claim accrues at least as soon as an injury (in the physical, not the legal, sense) first manifests itself to a substantial degree. Thus the report explains the unfairness of the one-year period in these terms (H.R. Rep. No. 276, *supra*, at 3-4):

> The 1-year existing period is unfair to some claimants who suffered injuries which did not fully develop until after the expiration of the period for making claim. Moreover, the wide area of operations of the Federal agencies, particularly the armed-service agencies, would increase the possibility that notice of the wrongful death of a deceased to his next of kin would be so long delayed in going through channels of communication that the notice would arrive at a time when the running of the statute had already barred the institution of a claim or suit.

These comments in the House report provide a basis for concluding that a claim cannot properly be held to accrue at any point after an injury manifests itself—*i.e.*, that even the "discovery" rule expressed in *Quinton* and *Urie* is too favorable to plaintiffs. We do not urge that position here, because it is supported by no more than a negative implication from a committee report, but the 1949 history of the Act strongly undermines the court of appeals' "knowledge of malpractice" rule. The committee's remarks, together with the reiteration throughout the legislative history of the Act and its amendments of a concern for avoiding litigation of stale claims, suggests that courts must be cautious in altering the traditional tort limitations rule.

In 1966 Congress amended the Act to make presentation of a claim in writing to an agency a prerequisite to suit on any claim.[10] 80 Stat. 307. Con-

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[10] The limitations provision in the 1946 Act required presentation of a claim to the federal agency concerned only if the claim was for $1,000 or less. Suits on claims exceeding that amount could be brought without prior agency consideration and would be timely if suit was brought within one year from the date of accrual. 60 Stat. 845.

gress again failed to specify what it meant by the reference to a claim's accrual, but in explaining the reasons for giving agencies greater authority to settle tort claims (another change made in 1966), the House and Senate committees responsible for the legislation again expressed concern for avoiding the necessity of litigating stale claims. S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966); H.R. Rep. No. 1532, 89th Cong., 2d Sess. 6 (1966).

If the 1966 amendments threw little light on Congress' understanding of the rule for determining when a claim accrues, provisions of another statute, enacted the same day as those amendments suggest that Congress well understood the difference between an ordinary limitations period and one in which the time for filing a claim is tolled until the potential litigant learns of his legal rights. 28 U.S.C. 2415 and 2416 establish a time limitation for actions commenced by the United States. The statute includes a three-year limitation on certain types of tort actions, beginning "after the right of action first accrues." 28 U.S.C. 2415(b). 28 U.S.C. 2416 specifies "exclusions" from the prescribed limitations periods, one of which is an exclusion of any period during which "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances * * * ." 28 U.S.C. 2416(c). This suggests that, in the view of Congress, a limitations period ordinarily begins to run whether or not all of the material facts are

known by the potential plaintiff. Only an exclusion can suspend the running of time. And even the exclusion provided in 28 U.S.C. 2416(c) covered only unknown *facts*, rather than (as here) unknown medical or legal judgments based on known facts. In the Tort Claims Act, of course, there are no exclusions from the limitations period. This shows, at the least, that a court should not stray far from traditional understandings of how statutes of limitations operate in construing 28 U.S.C. 2401(b).

C. This Court Has Applied a Causal Relationship Standard in Defining the Accrual of a Claim

The court of appeals in this case described the *Quinton* "test of 'discovery of the existence of the acts of malpractice upon which the claim is based'" as being "apparently precise" but "troublesome in the application" (Pet. App. 7a). The test is "troublesome" only if one ignores the decision of this Court in *Urie* v. *Thompson*, *supra*, on which *Quinton* principally relied. *Quinton* v. *United States*, *supra*, 304 F.2d at 240-241.[11]

[11] The *Quinton* court also cited a trend in the states—by legislation and judicial construction—away from the "majority rule that a cause of action accrues on the date of the negligent act, even though the injured patient is unaware of his plight." *Id.* at 240. This trend continued in the years following *Quinton* (see, *e.g.*, Note, *Medical Malpractice: A Survey of Statutes of Limitation*, III Suffolk U.L. Rev. 597, 614-615 (1969)); but a trend away from the discovery act has become evident as state legislatures attempt to cope with increasing numbers of medical malpractice suits. Note, *A Study of Medical Malpractice Insurance: Maintaining Rates and Availability*, 9 Ind. L. Rev. 594, 615 (1976).

The limitations question in *Urie* concerned the timeliness of a suit filed by a railroad worker under the Federal Employers' Liability Act, 45 U.S.C. (1940 ed.) 51 *et seq.*, to recover damages for his contraction of silicosis as a result of many years of inhaling silica dust emitted by malfunctioning railway equipment. The worker filed his suit within two years of the date on which his disease was diagnosed. The employer argued that the suit was barred by the three-year limitation period in the FELA because the worker contracted the disease more than three years before he filed his suit. This Court rejected that argument, finding that it was inconsistent with "the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights." 337 U.S. at 170.

The context of that statement shows that the Court considered the worker to be on notice of such an invasion once he learned that he was suffering from a disease attributable to his employment. The Court emphasized that the worker could not be charged with knowledge of the "inherently unknowable" beginnings of his disease—"the slow and tragic disintegration of his lungs" producing symptoms that had "not yet obtruded on his consciousness." *Id.* at 169. Failure to file a suit before the employee could be expected to know he had silicosis, the Court explained, was a failure attributable to "blameless ignorance." *Id.* at 170. But, the Court went on, the afflicted employee could "be held to be 'injured' * * * when the

accumulated effects of the deleterious substance manifested themselves" (*id.* at 170, adopting language from *Associated Indemnity Corp.* v. *Industrial Accident Commission*, 124 Cal.App. 378, 381 (1932)).

Although the question whether the employer in *Urie* had been negligent was hotly contested through two rounds of litigation in the state courts,[12] the Court did not suggest that the limitations period does not begin to run until someone advises a worker suffering from silicosis that the excess of dust in the air was "negligence." The Court instead identified the critical date as the date that the nature of the occupational disease was established. See 337 U.S. at 170. That inquiry usually is a simple one. Applied to this case, it leads to the conclusion that respondent's claim accrued no later than January 1969, when

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[12] The original complaint alleged that excessive amounts of silica dust were released from faultily adjusted sanding devices at the side of the railroad tracks. It also alleged that the devices were of "the usual and customary type," a statement that the Missouri Supreme Court characterized as an admission that the employer had adhered to the customary standards of the trade. The Missouri court had held that the admission was fatal to the statement of a claim of negligence. 337 U.S. at 175-180. This Court observed that the complaint nevertheless presented a jury question whether the employer knew or should have known that existing industry standards were inadequate to protect the health of its workers. *Id.* at 178. (The worker in *Urie* also filed an amended complaint alleging that the employer's equipment maintenance was inadequate and violated the employer's duty under the Boiler Inspection Act, 45 U.S.C. 23 *et seq.*; he obtained a judgment on this claim. 337 U.S. at 167-168. This Court upheld that judgment and accordingly found it unnecessary to remand for trial on the common law negligence issue).

Dr. Sataloff attributed respondent's hearing loss to the neomycin irrigation at the VA hospital. Respondent then had two years to investigate the connection further, obtain medical and legal advice, and file an administrative claim. That respondent waited until January 1973 to file a claim was entirely his own choice.

D. None of the Circumstances of This Case Supports Tolling the Limitations Period

A rule that a malpractice claim accrues within the meaning of 28 U.S.C. 2401(b) when the victim knows that he has been harmed by a particular medical treatment is not unfair to a victim of malpractice. The limitations period does not start running if the victim could not reasonably have discovered the link between his injury and the act producing it. Once the victim connects (or should connect) his injury and its cause, he has two years in which to seek professional advice, to investigate the possibility of recovering damages, and to file a claim if the advice he receives or his own investigations seem to warrant his doing so. This rule does not penalize "blameless ignorance;" it simply encourages the timely investigation of legal rights by victims, which any statute of limitations should do.

The attempt by the courts below to justify their different approach by reference to the facts of this case is unconvincing. The findings here establish that respondent knew, more than two years before he filed his tort claim, that "neomycin was the direct cause of his

hearing loss" (Pet. App. 12a); and respondent has never contended that he was advised by anyone that deafness was an expected risk of the treatment of his leg. Deafness resulting from a leg operation should be enough to put anyone on notice that something is amiss. The court of appeals nonetheless concluded that the running of the limitations period was suspended by a combination of three things: the technical complexity of medical malpractice, the VA's denials of causation, and the failure of respondent's physicians bluntly to tell him that the treatment was malpractice (Pet. App. 11a). The district court, in reaching a similar conclusion, also relied on the VA's denial of legal liability and on respondent's diligence in establishing the factual basis for his disability benefits claim (Pet. App. 54a, 61a). None of these circumstances, however, is material to the date of accrual.

The technical complexity of the malpractice issue in this case hardly distinguishes it from most other personal injury cases.[13] Negligence is a complicated issue requiring the testimony of expert witnesses in a great many tort cases. Moreover, the particular technical issue cited by the district court as justifying

[13] The medical question here is a good deal simpler than those encountered in cases of negligent surgery or negligent anaesthesia, in which the facts about the case may be difficult to ascertain and questions of the probabilities of harm given different approaches to the treatment may abound. The question of liability here is certainly much more simple than the question of liability in a case involving negligent manufacture of a vaccine or negligent design of an automobile.

respondent's failure to investigate the possibility of negligence—the question of "the propensity of the body to absorb a toxic antibiotic under a given mode of administration" (Pet. App. 61a)—was in dispute between the VA and respondent as early as 1969, when he asserted that hearing loss could be produced by the use of neomycin in an irrigation process if high enough blood levels of the drug were reached (see pages 6-7, *supra*). Congress took the "complexity" of tort cases into account in allowing victims two years in which to file a claim. The liberal discovery rules also aid in dealing with complexity. A court cannot properly rely on this same problem to extend the period of limitations. See *Soriano* v. *United States*, *supra*.

The suggestion that the VA's denials of liability warranted suspending the date of accrual until someone advised respondent that the VA's denials might be in error is similarly misguided. Most potential defendants are likey to deny legal liability when confronted with accusations that they have caused harm. To make ordinary denials a basis for postponing the accrual of a claim is to erode substantially the role of statutes of limitations. If a denial of liability postpones the accrual of a claim, any suit is timely so long as it is brought within two years of the most recent allegation and denial. Whatever the proper rule may be when a denial of liability so confuses or lulls a victim as to throw him entirely off the track,[14]

[14] See *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946) (fraudulent concealment of important facts justifies tolling of limitations period); *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959) (inducement by defendant not to sue can justify tolling). This case is a far cry from the fact patterns of *Holmberg* and *Glus*. Moreover, there is a serious question whether even lulling or misleading statements by the government could justify tolling in light of the Tort Claims Act's status as a waiver of sovereign immunity. Cf. *Munro* v. *United States*, *supra*, with *INS* v. *Hibi*, 414 U.S. 5, 8 (1973).

there was no such confusion here. Despite the VA's responses to his claims for benefits, respondent continued to assert that the neomycin irrigation caused his deafness and that the irrigation had been improper (see pages 5-8, *supra*). The VA's conduct thus did not deter or prejudice respondent in any way.

An even less appropriate ground for justifying the rule for accrual applied here is the fact, noted by the court of appeals, that until June 1971 respondent's physicians did not baldly "suggest * * * the possibility of negligence" (Pet. App. 11a). This rationale for postponing accrual simply begs the question, which is whether medical advice on "the possibility of negligence" has anything to do with the date of accrual. If, as we argue, knowledge of harm and causation is enough to start the limitations period running, then the precise date on which a physician first used the magic word "negligence" or "malpractice" is irrelevant. The court of appeals' observation does not establish *why* anything should turn on the date that a physician used a particular word.

Finally, there is the district court's reasoning that respondent's exercise of "all kinds of reasonable dili-

gence in attempting to establish a medical basis for increased disability benefits" militates in favor of finding that his claim did not accrue when he learned the cause of his deafness (Pet. App. 61a). In advancing this argument, the district court misapprehended what kind of diligence is required by any statute of limitations, including the one concerned here. It is beyond dispute that respondent actively pursued his disability benefits claim. Moreover, in pursuing that claim, he performed many of the tasks one would associate with preparation for litigation of a negligence claim. He consulted experts on drugs (A. 35, 81, 106); he gathered affidavits from his associates regarding whether he appeared to have a hearing difficulty before his VA hospitalization (A. 36); he inquired whether the means by which neomycin was administered to him could be expected to produce a hearing loss (A. 121). He did not, however, do what the statute of limitations here was designed to induce a potential litigant to do: he did not promptly file his tort claim. His filing of a claim for disability benefits is not an adequate substitute, and respondent has never contended that it is.[15]

[15] Even assuming that a failure to use Standard Form 95, the form for submitting a tort claim (Pet. App. 30a), is not in itself fatal to the validity of a written claim, the disability benefits application (A. 7) was inadequate as a tort claim because it failed to specify a sum certain. See *Avril* v. *United States*, 461 F.2d 1090, 1091 (9th Cir. 1972); *Bialowas* v. *United States*, 443 F.2d 1047 (3d Cir. 1971). Moreover, respondent's position throughout—a position accepted by the

Respondent's diligence, then, was in pursuing a possibility of compensation by some means other than proceedings under the Federal Tort Claims Act. His aggressiveness in pursuing that possibility, however, cannot excuse him from complying with the time rules of the Tort Claims Act, for pursuit of one remedy is not a ground for tolling the statute of limitations of another. *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976). Although respondent's pursuit of his claim for more disability benefits gave the VA notice that there was some controversy about the use of neomycin to irrigate wounds, and thereby relieved somewhat the evidentiary burden ordinarily imposed by a stale claim, this would not necessarily be so in other cases in which the court of appeals' approach would apply. Moreover, even in this case the government suffered some prejudice; as the district court noted (Pet. App. 60a n.22), the surgeon responsible for the neomycin treatment died before trial.

In sum, the courts below applied the statute of limitations of the Federal Tort Claims Act in a way that undermines its reason for being. If the claim here is timely, many future litigants will be substantially unconstrained by the limitations provision so long as they do not trouble themselves to inquire of anyone

courts below—has been that in none of his filings with the VA in connection with his benefits claim did he ever suggest to the government that he suspected the VA physicians of negligence. See also note 4 *supra*.

whether the injury they have suffered might possibly be the result of a negligence. Such a rule, which makes sleeping on one's rights a reason for extending the time within which to file a claim, is incompatible with the purposes and history of the Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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CORRECTED COPY

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1014

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM A. KUBRICK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR WILLIAM A. KUBRICK, RESPONDENT.

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OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit Court affirming the action of the District Court (Pet. App. 1a-14a) is reported at 581 F. 2d 1092. The opinion of the United States District Court for the Eastern District of Pennsylvania, granting relief to the respondent (Pet. App. 15a-70a), is reported at 435 F. Supp. 166.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petitioner's brief.

QUESTION PRESENTED.

Does a medical malpractice claim under the Federal Tort Claims Act accrue when the plaintiff learns of all elements of his claim i.e. injury, causation, the duty owed to him by the defendant and the breach of that duty where (1) plaintiff is hindered by the defendant from learning all of these elements and (2) the medical causation question is technically complex.

STATUTORY PROVISION INVOLVED.

28 U. S. C. 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing by certified or registered mail of notice of final denial by the agency to which it was presented.

STATEMENT.

This is a malpractice action initiated by William A. Kubrick, a disabled Korean War veteran, for injury he suffered because of a severe hearing loss and resultant speech impairment caused by negligent post-operative leg wound irrigation treatment with a solution of neomycin sulfate (Pet. App. 38a).[1]

The medical treatment and procedures which caused the loss and impairment of the respondent's hearing were administered under the direction of the United States Veterans Administration physicians at the Wilkes-Barre Veterans Hospital, Wilkes-Barre, Pennsylvania (Pet. App. 37a).

An action was filed by Kubrick on September 14, 1972 in the United States District Court for the Eastern District of Pennsylvania under the Federal Tort Claims Act, 28 U. S. C. 1346, for the profound damage he suffered as a result of the aforementioned malpractice (Pet. App. 30a; A. 5-6).

The case was tried before the Honorable Edward J. Becker of the United States District Court, sitting without a jury.

The facts, as adduced at trial and as found by Judge Becker,[2] are as follows: William Kubrick entered the

1. "Pet. App." shall hereinafter refer to citations to the Appendix to the Petition for a Writ of Certiorari; "A." shall hereinafter refer to citations to the Appendix to the Briefs; "R" shall hereinafter refer to citations to the Record in the District Court.

2. The facts, as found by the District Court, were specifically affirmed by the United States Court of Appeals for the Third Circuit (Pet. App. 12a). The United States Supreme Court ordinarily does not undertake to review concurrent findings of fact by two courts below in the absence of an obvious and exceptional showing of error. *Graver Tank and Manufacturing Co., Inc. v. Linde Air Products Co.*, 336 U. S. 271 (1949); *Graver Tank and Manufacturing Co. v. Linde Co.*, 339 U. S. 605 (1950); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U. S. 630 (1966); *American Federation of Musicians v. Carroll*, 391 U. S. 99, 105 (1968). See also F. R. C. P. 52(a). Nowhere in its Brief to this Court nor in the Petition for Writ of Certiorari does the Government allege or argue that the findings below are possessed of obvious or exceptional error. Because of this Court's reluctance to review factual findings where both lower courts concur, and in light of the fact that the Government does not oppose those findings, the findings of the District Court control this case. Therefore, the factual statement of the case will be to the findings of Honorable Edward J. Becker of the District Court for the Eastern District of Pennsylvania. This Court should consider only Judge Becker's factual findings in the review of this case.

Wilkes-Barre Veterans Administration Hospital on April 2, 1968 for treatment of a bone infection (osteomyelitis) of his right leg (Pet. App. 21a). On his admission to the Hospital Kubrick's hearing was normal (ibid.). After surgery on the affected leg Dr. H. Parker Wetherbee,[3] a Veterans Administration Hospital physician, ordered that a 1% solution of an antibiotic, neomycin, be used to irrigate the surgical wound. The wound was irrigated by using a system of hemovac tubes with the antibiotic solution for twelve to thirteen days (Pet. App. 22a). The respondent was discharged from the Veterans Administration Hospital on April 30, 1968; when the osteomyelitis cleared (ibid.).

In mid-June 1968, respondent noticed both a hearing loss and ringing in his ears (tinnitus) (Pet. App. 23a). To determine the cause of his hearing impairment, Kubrick saw several physicians and hearing specialists, including J. J. Soma, M.D.; none of these physicians could edify Kubrick as to the etiology of his hearing problems (ibid.). Kubrick eventually saw Joseph Sataloff, M.D., a hearing specialist in Philadelphia, in November 1968 who diagnosed Kubrick's problem as bilateral nerve deafness (ibid.). Dr. Sataloff informed the respondent that it was "highly possible" that his deafness was caused by the

3. Dr. Wetherbee died in 1969 (R. I 29-30).

neomycin solution administered at the Wilkes-Barre Veterans Administration Hospital (Pet. App. 24a).[4]

Kubrick continued to be treated by Dr. Sataloff until the summer of 1971 (ibid.). At no time did Dr. Sataloff ever advise or indicate in any way to the respondent that the neomycin had been negligently administered (Pet. App. 24a-25a). Consequently, the District Court found explicitly "it was reasonable for plaintiff to continue to believe, even after consultation with Dr. Sataloff, that his deafness was not the result of malpractice in view of the technical complexity of the question whether his neomycin treatment was unduly hazardous." (Pet. App. 25a).

After his consultation with Dr. Sataloff, Kubrick, who had only a grade school education (A. 99) and whose vocation was that of a maintenance mechanic (Pet. App. 41a), sought increased disability benefits from the Veterans Administration (Pet. App. 24a). On April 16, 1969, Kubrick enlisted the aid of Peter Dudish, a representative of the Disabled American Veterans in Wilkes-Barre, to complete the claim form for increased benefits for the respondent's hearing loss (A. 70-71). This request for an increase in benefits was sought by Kubrick solely because Dr. Sataloff told him that his hearing loss had been caused by neomycin and not because Kubrick had any idea that negligence was involved in the method of the neomycin administration (Pet. App. 29a).[5]

4. The Government in its Statement on page 4 of the Brief states that "Dr. Sataloff told respondent that the VA's administration of neomycin had caused his hearing loss." The finding of the District Court was that Dr. Sataloff had told the respondent ". . . that it was 'highly possible' (or other similar language) that the hearing loss was caused by the neomycin solution . . ." (Pet. App. 24a). See also Government's Brief p. 4, n. 1. The District Court's finding on this point is controlling here. See Note 2 of this Brief, *supra*.

5. Kubrick believed he was entitled to an increased disability allowance as a result of the neomycin treatment even if there was

In August 1969, the Veterans Administration Board of Physicians, which was composed of three Veterans Administration physicians, Dr. H. Stuart Irons, Chief, Surgical Service; Dr. Milton Kantor, Chief, Medical Service; and Dr. Edward R. Jarjigian, Chief, Psychiatry and Neurology Service denied Kubrick's claim (Pet. App. 25a; A. 13-14). The Board of Physicians in direct contradiction of Dr. Sataloff's statement of the probable connection between neomycin and deafness, informed Kubrick that they found no causal relationship between the hospital's use of neomycin and the hearing loss, because such hearing loss is associated only with systemic use of neomycin. Even though Kubrick at no time raised the issue, the VA also declared that there was no evidence of carelessness, accident, negligence, or lack of proper skill, error in judgment, or any other fault on the part of the Veterans Administration (Pet. App. 25a).

The August, 1969 denial of increased benefits and the denials of causation and malpractice were only the first in a long and persistent series of denials of causation and liability by the Veterans Administration (Pet. App. 25a-29a). The myriad VA officials and physicians sitting in judgment on Kubrick's case from 1969 until the final denial of respondent's claim in April, 1973 consistently and tenaciously held to their position that there was no negligence on the part of the VA doctors and that there was no

5. (Cont'd.)
no fault on the part of the VA; since he knew that a veteran was entitled to receive benefits for injury that occurred on active duty without regard to fault and he believed the same rule applied when a veteran was injured while a patient in a government hospital (Pet. App. 11a, A. 82-83). Kubrick was not aware that to get benefits under 38 U. S. C. 351 and its applicable regulations, 38 C. F. R. 3.358(c)(3); he had to show that the VA physicians were negligent (ibid.).

causal connection between the use of neomycin, the method of its application and the respondent's hearing loss (ibid.).

William Kubrick, after the initial denial of his request for increased VA benefits, wrote numerous letters and requests to several government agencies and various dignitaries, continuously asking that the Veterans Administration acknowledge the causal connection between his hearing loss and neomycin (Pet. App. 28a).[6]

On September 5, 1969, an Adjudication Officer in the Veterans Administration Center in Philadelphia advised the respondent that the Veterans Administration had found that his hearing loss was not related "medicinally or medically to his April 1968 hospitalization." (Pet. App. 25a-26a; A. 15).

In a "Statement of Case" issued on September 26, 1969, responding to Kubrick's request for further review, the Veterans Administration for the third time denied the claim because they could find neither a causal connection between the neomycin and his deafness, nor a showing of negligence or carelessness on the part of the VA (Pet. App. 26a; A. 16-20).

Kubrick continued to pursue his claim. After a hearing before the Board of Veterans Appeals, consisting of John G. Riggins, M.D., I. Kleinfeld and J. L. Ray, the Board remanded Kubrick's case for further investigation (A. 23-29). In the course of this investigation, Dr. J. J. Soma was interviewed by the Veterans Administration

6. The Government at page 7 of its brief cites a portion of one of the letters written by Kubrick. The District Court has decided that the aforementioned letters present only a "flurry of rhetoric induced by desperation" (Pet. App. 28a). The Court further stated, "We credit plaintiff's testimony that he did not, prior to his June 1971 interview with Dr. Soma, suspect that there was negligence involved. We find that as of the date of those letters plaintiff believed his entitlement to VA benefits followed if the neomycin administration caused the hearing loss without negligence." (ibid.).

(Pet. App. 26a-27a; A. 30-31). According to the VA investigator, J. A. Nagy, Dr. Soma stated that Kubrick's deafness resulted from his employment in a machine shop (ibid.). Mr. Nagy's report on his interview with Dr. Soma was sent to Kubrick by the VA as a Supplemental Statement of Case (ibid.).

The respondent confronted Dr. Soma with this report and Dr. Soma denied having made the statements attributed to him by the VA (Pet. App. 27a). On June 2, 1971, Dr. Soma told Kubrick that neomycin absorption in his system had caused his hearing loss and that the neomycin should never have been used (Pet. App. 27a-28a).

Prior to his being told by Dr. Soma that the VA physicians erred in the administration of neomycin, Kubrick's belief that no malpractice was present was reasonable because of the technical complexity of whether the neomycin treatment involved excessive risks, failure of any of the doctors Kubrick consulted prior to June 1971 to suggest or reveal the possibility of negligence, and the repeated, unequivocal assertions by the VA that there was no negligence on the part of the Government (Pet. App. 29a).

Again, on August 9, 1972, the Board of Veterans Appeals, by H. J. Schlegel, John G. Higgins, M.D. and I. Kleinfeld, denied the claim saying that there may have been a causal connection between the neomycin administration and Kubrick's defective hearing, but continuing to deny that there had been any negligence (Pet. App. 30a; A. 40-48).

The respondent's administrative claim (Form 95) was rejected in a letter to respondent's counsel on April 13, 1973 (Pet. App. 30a; A. 49-50).

On July 15, 1975, the VA, sua sponte, reconsidered its earlier decisions on Kubrick's petition and granted respondent proper benefits; the decision to reverse the ear-

lier denials was based on the fact that those earlier decisions had been "clearly and unmistakably erroneous" (Pet. App. 30a-31a; A. 51-55).

On July 22, 1977 Honorable Edward J. Becker filed an opinion in which he found:

> (1) the action was prosecuted within the applicable statute of limitation because the claim did not accrue until Kubrick knew all the elements of his cause of action, i.e. duty, breach, causation and injury
>
> (2) the VA physicians were negligent in the method of administration of neomycin to Kubrick
>
> (3) the neomycin administration was causally connected to the respondent's deafness, and
>
> (4) the Government was liable to the plaintiff for hearing loss damages in the amount of $320,536.00.

The District Court in deciding that Kubrick's claim did not accrue until he knew that the medical treatment had been negligently administered began its discussion with the *Quinton v. United States*, 304 F. 2d 234 (5th Cir. 1962) "discovery rule" and the *Urie v. Thompson*, 337 U. S. 163 (1949) "blameless ignorance" rule. The District Court found the Government's reading of *Quinton* to be "simplistic and conceptually inaccurate" (Pet. App. 50a). Judge Becker further declared that where the patient determines the relationship between treatment and injury, but even after diligent efforts, still has no reason to think that there was negligence in his treatment, the statute does not begin to run.

The District Court held that the *Quinton* test created a rebuttable presumption that knowledge of the causal relationship between treatment and injury is enough to alert a reasonable person that there may have been negligence related to the treatment (Pet. App. 51a).

The Court declared that Kubrick rebutted this presumption and could not be said to have known of negligence until June, 1971, when Dr. Soma told him that he had been treated improperly in the administration of neomycin (Pet. App. 61a). Kubrick's claim, then, according to the District Court did not accrue until June, 1971. His complaint was filed in the District Court on September 14, 1972, within the applicable period of the statute of limitations from the time of accrual of his cause of action.[7]

7. The District Court reasoned, in response to the Government's objection to Kubrick's failure to file his administrative claim under 28 U. S. C. 2675(a) before his institution of District Court action, that since the administrative claim was filed on January 13, 1973, and rejected on April 13, 1973 within the statute of limitations, 28 U. S. C. 2675(a) had been substantially complied with. Judge Becker could see no reason to force Kubrick to refile a complaint which was already before the Court, in order to technically comply with 28 U. S. C. 2675(a) (Pet. App. 61a-62a, n. 23). The court said, "To hold otherwise would be to elevate form over substance and erroneously presume a legislative intent to bar a plaintiff's complaint purely because he did not go through the technical procedure of raising a complaint which was already before the Court." (ibid.). The Government did not preserve its argument on 28 U. S. C. 2675(a) either in the Court of Appeals nor has that issue been raised in This Court. The Court of Appeals, sua sponte, dealt with the issue of filing of the administrative claim, "We agree with the District Court's conclusion that where the administrative claim is denied before any substantial progress has been made in the pending litigation the suit need not be refiled to be effective." (Pet. App. 13a). The sole question for resolution by this Court is the determination of when a "claim accrues" in a medical malpractice action under the Federal Tort Claims Act. The Government should be precluded from arguing the issue as to the administrative appeal under 28 U. S. C. 2675(a) by indirection or otherwise. That question has been decided and has not been properly raised before this Court either in Petition for Certiorari or in the Government's Brief. For purposes of this appeal, the determination of both the District Court and the Court of Appeals, that the filing of the administrative claim and the refiling of the lawsuit would have been an empty gesture and an elevation of form over substance, controls.

The Government appealed to the United States Court of Appeals for the Third Circuit; that Court substantially affirmed both the findings of fact and the conclusions of law of the District Court.[8]

The Third Circuit found that Kubrick's claim did not accrue until he discovered that there was negligence involved in the administration of neomycin. The Court declared that in many cases, knowledge of the causal connection between treatment and injury should alert a reasonable person that there had been malpractice. However, in other instances where knowledge of the causal connection does not lead a reasonable person to believe that there has been negligence, a different rule must apply. In those situations, if the plaintiff can show he exercised diligence but still did not know that the treatment was improper; then the statute of limitations does not begin to run until the plaintiff learns of the breach of duty (Pet. App. 10a). The Third Circuit found that Kubrick knew of two of the essential elements, causation and damages; he did not know of the breach of duty until he was told of the negligence by Dr. Soma (Pet. App. 12a). That Court declared after discussion of its proposed rule, that "Any other result would be inequitable and contrary to the 'blameless ignorance' rationale underlying the *Quinton* discovery rule." (Pet. App. 10a).

The Government then petitioned for a Writ of Certiorari to the Third Circuit on the sole issue of when Kubrick's claim accrued, under the Federal Tort Claims Act. This Court granted the Government's request for certiorari on that issue on February 21, 1979 (A. 145).

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8. The Third Circuit remanded the case solely to set off augmented Veterans Administration benefits from the District Court's damages award, pursuant to 38 U. S. C. 351 (Pet. App. 13a-14a).

SUMMARY OF ARGUMENT.

The issue for determination is when does a medical malpractice claim "accrue" under the provisions of Federal Tort Claims Act. To ensure compliance with the purposes of that Act and to ensure equitable treatment, a claimant must discover all aspects of his cause of action; injury, causation, duty and breach of that duty before a claim can be said to have accrued.

Medical malpractice claims are often technically complex and supporting evidence is not readily accessible to the layman. Claimants are often stymied in their attempts to provide such expert interpretation because of the conspiracy of silence i.e. that physicians are generally unwilling to reveal either their own or a colleague's malpractice. In this case, in fact, the Veterans Administration, its physicians and private physicians prevented the respondent from discovering both the causation of his injury and the malpractice involved.

There is no definition of "accrual" in the FTCA or its legislative history and, therefore, there must be an interpretation within the context of the purposes of that Act. The FTCA was created to provide a remedy for victims of the negligence of governmental employees in a uniform and fair way. The United States is liable in the same way as a private person would be.

The ordinary meaning of accrual is "to vest as a right." To ensure that the FTCA purposes are complied with in technical medical malpractice cases, "accrual" must be interpreted to include all aspects of a cause of action—injury, causation, duty and breach of duty. None of the purposes of the statute of limitations are thwarted when these elements must be discovered before an action accrues. The respondent was not sleeping on his rights—he was not aware of them. The claim was not false, fraudulent,

tenuous or frivolous—only extremely difficult for a layman to comprehend without expert aid. The Government lost no evidence and was not prejudiced because this lawsuit was brought shortly after discovery of malpractice.

The blameless ignorance rule of *Urie v. Thompson* governs this case and requires that blameless ignorance be defined to include knowledge of malpractice as well as causation and injury. The purpose of the *Urie* rule is to eschew depriving a right to one who is ignorant of that right. *Quinton v. United States*, which specifically deals with a discovery rule in a medical malpractice case adopts the *Urie* "blameless ignorance" doctrine. To limit *Quinton* only to discovery of causation and injury is to interpret that rule too narrowly which would punish the blamelessly ignorant—a result never intended by the *Quinton* court.

Since the issues in this case are medically complex and the respondent was effectively precluded by the VA, its physicians and other doctors from learning both the cause of his harm and the conduct of his treating physician, the reasoning of the court of appeals in requiring knowledge of negligence is based on sound legal and equitable principles supported by the case law cited in this Brief.

ARGUMENT.

A. The Uniqueness of Complex Medical Malpractice Actions Must Be Considered in Determining When a Cause of Action Accrues Under the Federal Tort Claims Act.

In describing the liability of the United States for the negligence of government employees, 28 U. S. C. 2674 states in pertinent part:

> The United States shall be liable respecting the provisions of this title relating to tort claims in the same manner and to same extent as a private individual under like circumstances . . .

In vesting jurisdiction in the United States District Courts, Congress also mandated in 28 U. S. C. 1346 that the district courts

> . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

United States v. Brown, 348 U. S. 110 (1954) held that medical malpractice claims were among the torts that Congress meant to include within the coverage of the Federal Tort Claims Act (hereinafter FTCA).

The plaintiff in a medical malpractice case however, is in a different position from the usual FTCA claimant

in his ability to discover and to act on his claim for several reasons. In most actions prosecuted under the FTCA, the claimant is aware of the likelihood of negligence coincidentally with his awareness of his injury. Unfortunately, in the medical malpractice area, the existence of the injury, its causation, and the negligence of the medical practitioner may all elude the claimant. Questions of causation are difficult to comprehend, as are questions of duty and breach of that duty. The plaintiff must grasp the medical complexities of the cause of his injury and, further, must understand that malpractice was involved in his treatment. To acquire knowledge relating to causation and malpractice, the claimant must rely on medical advice unless they are easily identifiable. In the difficult case, absent such expert advice, the plaintiff remains ignorant of whether his cause of action is viable.

Laymen, generally, do not possess the expertise to understand complex medical malpractice problems. There is an awareness by the courts of the lack of expertise of laymen in understanding medical problems. Consequently, in the trial of the majority of medical malpractice cases, expert medical testimony is necessary to establish causation and to show violation of the medical standard of the community where the alleged malpractice occurred. W. Prosser, *Handbook of the Law of Torts*, 3rd ed. 167 (1964). Without the expert medical witness as interpreter, most medical terminology would be meaningless to a jury. Like the jury, potential malpractice claimants are dependent upon physicians to aid them in determining whether there is a cause of action. Unfortunately, the quest for a physician who will reveal either his own or a colleague's malpractice is a difficult one.[9] Physicians

9. Markus, Richard M., *Conspiracy of Silence*, 14 Clev.-Mar. L. Rev. 520 (1964); W. Prosser, *Handbook on the Law of Torts*, 167 (1964).

more often will either whitewash another physician's negligent acts or fail to reveal those acts at all to a patient. Many acts of malpractice go undisclosed, while others may not be divulged until a time after the expiration of the statute of limitations. The failure to reveal malpractice is present in the record in the case sub judice to an alarming degree. See Section E of this Brief, *infra*.

Medical records, too, are often inaccessible to the claimant. Most states do not allow distribution of medical records to patients, absent their being subpoenaed for litigation purposes. Tucker, *Patient Access to Medical Records*, Legal Aspects of Medical Practice, 45, 48-49 (Oct., 1978). Even if the patient could interpret and understand his own medical records, he could probably not gain access to them unless he had already begun litigation. The patient must depend on a physician to obtain his records and to interpret them. If no physician is willing to obtain and interpret these records, a person may be precluded from knowing that malpractice was involved in his treatment.

In cases of adverse drug reactions, as in this case, claimants are dependent upon physicians for guidance as to causation questions and as to questions of whether or not there has been impropriety in the drugs used and/or their administration. The patient often does not even know the correct questions to ask, if he suffers an adverse drug reaction. Questions which probably should be asked are as follows: (1) Is the adverse result of the drug a lesser evil than what the result might have been without treatment? (2) Is the cause of action against the drug company for production of a defective product? (3) Was the administration of the drug negligent because the drug was given incorrectly, or because the dosage was too large or too small? (4) Is there a cause of action against a physician for negligence in administering the drug? All of

these questions and more, if a layman can formulate them, require expert opinion to determine whether or not there is a cause of action. If the potential claimant does not find a medical expert who is willing to help formulate questions and who will answer those questions candidly, a claim may be foreclosed by the statute of limitations through no fault of the claimant's, but only because of his blameless ignorance.

The claimant, who is not aware of all the elements of his medical malpractice claim, is ill-advised to bring such an action; particularly in light of recent cases brought by physicians against both plaintiffs and their attorneys, some of whom rushed to sue before they were sure of a viable right. Such actions include defamation, malicious prosecution, abuse of process and in some cases, prima facie tort: See Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions*, 45 Fordham L. Rev. 1003 (1977); *Drago v. Buonagurio*, 402 N. Y. S. 2d 250 (1978). The attorney who brings a lawsuit when he knows only injury and causation but is not sure of malpractice may also be subject to professional disciplinary proceedings. He would be knowingly advancing a claim which is not warranted under the law. ABA Code of Professional Responsibility, DR-7-102(A)(2).[10]

Since claimants in complex medical malpractice cases have a difficult task in determining all aspects of the cause

10. The government suggests at pages 19 and 32 of its Brief that the plaintiff could file suit after knowledge of causation and injury and utilize discovery techniques to understand the technical complexity of his claim and to determine whether there has been medical malpractice. Adopting such a tactic would subject both claimants and attorneys to actions for defamation, prima facie tort, malicious prosecution or abuse of process. Such hasty filing of suit before all aspects of a cause of action are known could very well subject attorneys to disciplinary proceedings under the ABA Code of Professional Responsibility.

of action, the statute of limitations rule which governs the FTCA must allow the plaintiff to discover all elements of his cause of action: injury; causation, duty, and breach of that duty. Such a rule is consonant with the purposes of the FTCA, the history of the Act, and the purposes of a statute of limitations.

B. After Balancing the Purpose of the Federal Tort Claims Act, to Provide a Remedy to Victims of Negligence, With the General Purposes of the Statute of Limitations to Prevent Stale Claims; a Claim Must Be Considered to Accrue When the Victim of Medical Malpractice Discovers Injury, Causation, Duty and Breach of That Duty.

1. When "Accrues" Is Defined in the Context of the General Purposes of the FTCA, to Compensate in a Uniform Way the Victims of the Negligence of Government Employees, a Claim Accrues at Such Time the Plaintiff Learns All Aspects of His Cause of Action—Injury, Causation, Duty, and Breach of That Duty.

The statute of limitations under the FTCA is contained in 28 U. S. C. 2401(b), which provides in pertinent part,

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues.

The question of statutory interpretation for this Court, then, is when does a claim accrue in a medical malpractice case under the FTCA.

The standard for interpreting the FTCA was set forth in *Indian Towing Co. v. United States*, 350 U. S. 61 (1955).

There, the Supreme Court recognized both a duty of strict statutory construction of a statute which abrogates sovereign immunity, along with the duty to interpret the statute so as not to make the abrogation of immunity more narrow than Congress intended. There is no definition of when a "claim accrues" in the Act itself, 28 U. S. C. 2401(b). The sparse and sketchy legislative history of the FTCA, a part of the Legislative Reorganization Act of 1946, is of no help in determining what Congress meant by "accrues" or in determining Congress' attitude toward the statute of limitations [11]; likewise the legislative history of the amendments to the FTCA are no aid.[12]

11. The legislative history of the Legislative Reorganization Act of 1946 is contained in S. Rep. No. 1400, 79th Cong., 2d Sess. (1946). The history of the Federal Tort Claims Act comprises four pages (*ibid.*, 29-33). Nowhere in the legislative history of the 1946 Act is there any clue as to the intent of Congress with respect to the statute of limitations or any information as to Congress' view of the definition of "accrual". The legislative history contains only a paraphrase of 28 U. S. C. 2401(b) (*id.* at 33). Although myriad bills to abrogate sovereign immunity in tort were proposed and defeated, proposed and tabled, or vetoed prior to the passage of the 1946 Act; none of the legislative history of the earlier bills was incorporated in the legislative history of the FTCA. *United States v. Yellow Cab*, 340 U. S. 543 (1950). See also Note, *The Federal Tort Claims Act*, 56 Yale L. Rev. 534 (1947). Since none of the legislative history of the earlier proposed Acts is included in this Act, the legislative history of earlier defeated Acts, is of no significance or force. See *United States v. Yellow Cab, supra.* The legislative history which has lost its significance because it has not been incorporated in the legislative history of the FTCA is H. R. Rep. No. 2800, 71st Cong. 3rd Sess. 5 (1931), Hearings on H. R. 5065 before the Subcomm. of the House Comm. on Claims, 72nd Cong. 1st Sess. 14 (1932), 67 Cong. Rec. 11087 (1926) (remarks of Rep. Underhill); the Government relies on the above-mentioned history in its Brief at pages 23-24.

12. In 1949 in 63 Stat. 62, Congress extended the statute of limitations in the Federal Tort Claims Act from one year to two years. The legislative history of that statute sheds no light on the meaning of accrual. H. R. Rep. No. 276, 81st Cong., 2nd Sess. (1949). That history speaks of only extension of the *statute of limitations* to two years, so that the one-year period would not work

There is no definition of "accrues" either in the Act itself or in the legislative history of the FTCA; therefore, it is for the courts to establish a definition of accrual of a claim in accord with the general purposes of the Act and in the context of those purposes. *United States v. American Trucking Associations, Inc.*, 310 U. S. 534 (1940).

Congress' general purpose in enacting the FTCA was to provide a remedy to those who had been without because the negligence they suffered from had been inflicted by governmental employees. S. Rep. No. 1400, 79th Cong. 2d Sess. 30 (1946): *Feres v. United States*, 340 U. S. 135, 139-140 (1950). Congress was also mindful that the public treasury could more readily deal with such losses than could the private individual who might be left destitute and grievously harmed: *Rayonier v. United States*, 352 U. S. 315 (1957). Congress apparently decided that that loss occasioned by harm caused by governmental employees should be spread among the taxpay-

12. (Cont'd.)
an injustice on those whose injuries had not fully developed until after the one year statute expired (*ibid.*). In effect, the report discusses only the time after accrual of action and seems to relate to the extent of injuries rather than knowledge of elements of a cause of action.

The 1966 Amendments to the FTCA, 80 Stat. 307 are neither relevant to the statute of limitations nor do they aid in defining when a claim accrues. Failing to find any definition of when a claim accrues under FTCA in the legislative history of the 1966 Amendments, the Government looks to an Act passed the same day as those amendments for aid. That Act, 28 U. S. C. 2415 and 2416 created a statute of limitations on suits by the government where no such limitation had existed before. Certainly the policies underlying the FTCA are different from the policies underlying 28 U. S. C. 2415 and 2416. Secondly, neither the statute of limitations nor the definition of accrual under the FTCA was even under consideration by the Congress that passed 28 U. S. C. 2415 and 2416. The fact that 28 U. S. C., 2415 and 2416, passed by the Congress in 1966, contain exceptions to general statute of limitations language is of no relevance as to what the 79th Congress meant by accrual or what Congress' view of the statute of limitations was in 1946.

ers since the taxpayers benefit from the work of the governmental employees—(id. at 319-320). Further, the statute was designed to make the perpetrators of negligence in the operation of governmental activities, liable in the same way as a private person would be liable. *Indian Towing Co. v. United States*, 350 U. S. 61 (1955).

Another purpose in Congress' passage of the FTCA was to do away with the arbitrary, non-uniform private bill system for granting relief to victims of the torts of governmental employees and to replace that system with a uniform and fair method of compensating victims of governmental negligence. Note, *The Federal Tort Claims Act*, 56 Yale, L. Rev. 534 (1947).

According to Black's Law Dictionary, 4th Ed. 37 (1968), the word "accrue" is derived from the Latin "ad" and "creso"—to grow to . . . A cause of action accrues whenever a suit may be maintained thereon; whenever one person may sue another." (citations omitted). The first meaning of "accrue" in *Webster's Third New International Dictionary of the English Language*, unabridged, 1969, p. 13 is "to come into existence as an enforceable claim; vest as a right <a cause of action has accrued when the right to sue has become vested>."

Congress certainly had the option in defining a period of limitations under the FTCA to use language other than "accrues" in determining when the statute begins to run. Congress could have created a limitation of action to commence the statute from the date of the injury, the date of the accident, the date of the discovery of the injury, the date of discovery of the injury and causation, or the coalescing of the date of discovery of the injury, causation, duty to the plaintiff, and breach of that duty, as found by the courts below. In using "accrues", Congress used a word which would permit a flexible interpretation of the

statute of limitations by the courts. This is particularly true where "accrues" is nowhere satisfactorily defined in the FTCA itself or explained in the legislative history.

It is submitted that a litigant does not know that his right to sue has matured until he knows there has been negligence and until he knows that injury has been perpetrated on him and by whom. The ordinary meaning of accrual requires that a plaintiff know injury, causation, duty, and breach of duty.

2. The General Purposes of the FTCA Must Be Balanced With a Statutes of Limitations Policy to Develop a Definition of Accrual That Is Equitable to Plaintiffs and Defendants.

Congress was probably mindful of general statute of limitations policies when it included 28 U. S. C. 2401(b) in the FTCA. Under those policies, the defendant has the right to be protected from stale, tenuous, frivolous and fraudulent claims. This is particularly true when evidence is lost and memories have faded. *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177 (1950).

The purposes of the FTCA, the general purposes of the statute of limitations and the meaning of the word "accrual" must all be considered in determining when the statute of limitations begins to run. In determining what Congress meant by accrual, it is necessary to balance the general purposes of the FTCA against the purposes of the statute of limitations provisions in that Act.[13]

In a case such as the one at bar, where there are complex medical malpractice issues and where a plaintiff has been misled as to whether he has a cause of action at all,

13. See also *Lopez v. Swyer*, 62 N. J. 267 (1973) and *Yoshizaki v. Hilo Hospital*, 433 P. 2d 220 (Sup. Ct. Hawaii 1967) for similar balancing tests under state law.

the interest of the defendant in the statute of limitations pales in comparison with the policy of granting the plaintiff the right to recover in tort against government employees.

The respondent knew it was "highly possible" that neomycin was related to his deafness in November, 1968 (Pet. App. 24a). Under the Government's definition of accrual, the respondent's right of action would be barred before he learned in 1971 that his hearing loss resulted from improper use of neomycin (Pet. App. 27a-28a). Under the Government's definition of "accrual" the respondent would be barred from asserting a claim even before he knew he had a cause of action. Such an interpretation of "accrual" would be absurd,[14] particularly in light of Congress' intent under the FTCA to provide a remedy to tort claimants and in light of the Congressional intent to provide a uniform, equitable system to compensate such claimants. See Section B. 1. of this Brief, *supra*. Absurd results are to be eschewed in statutory construction. *Commissioner v. Brown*, 380 U. S. 563, 571 (1965).

The next inquiry in the balancing test between the general purpose of the FTCA to grant relief to an aggrieved plaintiff in a complex medical malpractice case, and the purposes of the statute of limitations, is to determine whether the defendant has been prejudiced by the delay in filing suit. In this case, the answer is soundly no. The defendant has the right to be protected from stale, false, and fraudulent claims, and to be protected from having to defend a lawsuit where witnesses have been lost and memories have faded.

The claim asserted by Kubrick was not stale; as a matter of fact, because of the plaintiff's persistence, the

14. See *Berry v. Branner*, 421 P. 2d 996, 998 (Sup. Ct. Ore. 1966); *Rosane v. Senger*, 149 P. 2d 372, 375-376 (Sup. Ct. Col. 1944).

claim was fresh in the minds of the Veterans Administration up until the time he instituted suit, in September, 1972 (Pet. App. 24a-29a). Kubrick put the VA on notice as early as April 1969 that he was deaf as a result of the treatment he received at the Wilkes-Barre VA Hospital in April, 1968 (Pet. App. 24a).

Far from sleeping on his rights, Kubrick was intent on enforcing those rights he believed he had (Pet. App. 24a-29a). When he learned he had the right to sue the Government, he promptly pursued that right as well.

It is extremely doubtful that any evidence was lost in this case. The VA obviously relied on medical records from Kubrick's 1968 hospitalization in order to refute his contentions as to causation (Pet. App. 24a-29a). Nowhere does the government allege that evidence has in fact been lost. The Government does state that H. Parker Wetherbee, Kubrick's treating physician at the VA, was dead before suit began. This argument is of no support to a claim that evidence was lost, since Dr. Wetherbee died in 1969 (R. I-29). Even under the Government's definition of accrual, Wetherbee would have been unavailable for trial in 1970; when the Government contends the statute of limitations should have run.

Though a statute of limitations can prevent false, fraudulent and frivolous claims, the Government has never contended that the profound deafness from which Kubrick suffers is in any way false, fraudulent or frivolous.

None of the evils a statute of limitations is designed to protect against are present in this case. The VA knew of Kubrick's claim within one year of his operation; they knew the claim was genuine; and they relied on their medical records to refute his claim of causation between neomycin and deafness.

The equities of this balancing test favor the plaintiff. He put the VA on notice of his possible claim even before

he knew the treatment which caused his deafness was negligent. To penalize him by barring his right to sue before he knew he had a claim, when none of the reasons underlying the statute of limitations are here, would be inequitable and unconscionable, and would thwart the general purposes of the FTCA; i.e., to grant remedies to injured plaintiffs in a uniform way.

C. This Court's Rule of "Blameless Ignorance" Governs This Case and Requires Accrual of the Cause of Action in Medical Malpractice Cases After Knowledge of Injury, Causation, Duty and Breach of Duty.

The "blameless ignorance" doctrine was first enunciated in the case of *Urie v. Thompson*, 337 U. S. 163 (1949). In that case Urie instituted suit in the Missouri state courts under both the Federal Employees Liability Act, 45 U. S. C. 51 et seq. (1940 ed.) and the Boiler Inspection Act, 45 U. S. C. 23 et seq. He was granted judgment in the amount of $30,000.00 under the Boiler Inspection Act. The railroad appealed on the ground that the statute of limitations had run years before his institution of suit.

Urie was first exposed to silica dust in 1910 while employed by the railroad and was exposed continuously until 1940. He inhaled the dust while working in the cabs of locomotives. In 1940 he ceased working because of a pulmonary disorder, diagnosed then as silicosis. Urie brought suit in 1941. This Court in *Urie* held that the railroad worker's cause of action did not accrue until 1940, when he was diagnosed as having silicosis. Urie filed suit well within the three year limitations period specified by the Federal Employers Liability Act. The *Urie* court held that the traditional purpose of a statute of limitations is to "*require the assertion of claims within a specified period of time after notice of the invasion of legal rights*" (emphasis added) *Urie v. Thompson, supra* at 170.

Had the *Urie* court barred the railroad worker's claim, he would have been denied his right to bring suit against his employer, solely because he had not discovered his "unknown and inherently unknowable disease" earlier. *Urie v. Thompson, supra* at 169. The Court declared that "We do not think the humane legislative plan (of the FELA) intended such consequences to attach to blameless ignorance." (*id.* at 170).[15]

Even though, in Urie's case, the cause of action began to accrue when Urie learned of his ailment and its relationship to his employment, the policy of the *Urie* case can and should be read more broadly to include situations where any component of a cause of action is "unknown" and "inherently unknowable" to the potential litigant. In *Urie*, the diagnosis of silicosis informed the plaintiff of the harm. Inherent in the diagnosis, too, is the inference of negligence on the part of the railroad in permitting its employees to breathe the silica dust, without any safeguards.[16]

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15. The purposes of the FTCA indicate that the Congress in enacting that legislation also had a humane legislative plan in mind; to provide uniform compensation for victims of tortious conduct by government employers. *Feres v. United States*, 340 U. S. 135, 139-140 (1950); *Rayonier v. United States*, 352 U. S. 315, 319-320 (1957); *Indian Towing Co. v. United States*, 350 U. S. 61 (1955). See also Section B, *supra* of this Brief for a more detailed statement on the purposes of the Act.

16. The Government argues in its Brief at page 29 that no one had to tell Urie that there was "negligence" before he filed his claim. The Government further says that once one knows the connection between injury and causation, the inquiry is usually a simple one. We agree with the government that the inquiry often is simple. Once Urie learned of his affliction, his inquiry was simple. Urie's diagnosis triggered notice of causation which in turn triggered notice to him of negligence on the part of the railroad in allowing a condition to exist which caused workmen to inhale such

In this case, the relationship between injury and causation is neither self-evident nor simple. To deny Kubrick adequate compensation in damages because he did not know, nor in the exercise of reasonable diligence did he find out an element of his cause of action, is to punish him for blameless ignorance. Because of *Urie*'s underlying policies; (1) to prevent the loss of a cause of action because of blameless ignorance and (2) to adhere to the traditional purposes of the statute of limitations which require the assertion of claims in a specified period of time after notice of an invasion of right, that case was not meant to be limited or applied as literally as the Government would have this court believe.

Urie presents this Court with a broad policy which dictates that Kubrick's claim did not accrue until he knew all aspects of his cause of action. Even though Kubrick knew that it was "highly possible" that neomycin caused his deafness, he did not know that the administration of neomycin was negligent. All indications point to the conclusion that Kubrick may never have determined that he had a cause of action unless Dr. Soma so told him.[17] He

16. (Cont'd.)
deleterious substances. In other cases like the case *sub judice*, the inquiry is not simple. It is in these situations that the Urie doctrine must be applied to additional components of a cause of action other than just causation and injury.

17. Although in this case, Kubrick did not know his treatment was negligent until he was told by a physician, we do not assert that in all cases, as the Government intimates at page 20 of its Brief, that potential claimants must wait for doctors to come to them. In fact, here, it was in the course of investigating an erroneous VA report that Kubrick consulted Dr. Soma (Pet. App. 26a-27a). In many cases, the imprimatur of a physician is not necessary in determining negligence; for it would be obvious to a layman. In this case, however, because of the complexity of the drug reaction, only a physician would be able to know that the method of the neomycin administration was negligent. Without Dr. Soma's aid, Kubrick would have been blamelessly ignorant until a physician or other

was blamelessly ignorant of the fact of malpractice. Kubrick's cause of action did not mature or accrue until he learned that Dr. Wetherbee had negligently administered neomycin (Pet. App. 30a-31a; A. 51-55).

Urie must be interpreted to create the accrual of a cause of action when a claimant knows all the aspects of his cause of action. Blameless ignorance of negligence in this medical malpractice case under the FTCA is just as devastating to the plaintiff's knowledge of whether or not he has a cause of action, as was Urie's ignorance of his injury and its cause. To deny Kubrick relief because he did not know of negligence at the time he knew of causation between his hearing loss and neomycin is to punish the blamelessly ignorant.

D. The Discovery Test in *Quinton v. United States*, Like *Urie v. Thompson*, Must Be Interpreted to Include Discovery of Injury, Causation, Duty and Breach of Duty.

Quinton v. United States, 304 F. 2d 234 (5th Circuit 1962) incorporated the "blameless ignorance" doctrine of *Urie v. Thompson, supra*, into its discovery rule for medical malpractice cases under the FTCA. In *Quinton* the plaintiff was given RH positive blood while under treatment at a VA Hospital in 1956; her blood type was RH negative. Not until June 1959 during her pregnancy, did plaintiff learn of the error. In holding that her claim did not accrue until 1959, and in consideration of the *Urie v. Thompson* "blameless ignorance" principle and the

17. (Cont'd.)
medical professional informed him that there had been malpractice. Perhaps he would have had to wait until the VA determined that there had been negligence in 1975 (Pet. App. 30a-31a; A. 51-55). His claim, then, cannot be said to accrue until he is led from blameless ignorance by an expert medical opinion.

uniqueness of medical malpractice situations, the *Quinton* court formulated the following test.[18]

> . . . a claim for malpractice accrues against the Government when the claimant discovered or in the exercise of reasonable diligence should have discovered the acts constituting the malpractice. *Quinton v. United States,* 304 F. 2d 234, 240.

Under the facts of *Quinton,* the claim accrued when Mrs. Quinton discovered that she had been given blood of the wrong type. The Government narrowly reads the discovery test in *Quinton* as meaning that a cause of action accrues under the FTCA when the litigant discovers the cause of the injury. In *Quinton,* when the patient learned she had been given blood of the wrong type, she learned causation and malpractice simultaneously. *Quinton* should not be read literally, as the Government urges.[19] If read literally, the policy reasons underlying *Urie* and *Quinton*

18. The discovery test as enunciated in *Quinton* has been accepted by all of the federal circuits that determine accrual of a cause of action under the FTCA by applying federal law. *Toal v. United States,* 438 F. 2d 222 (2d Cir. 1971); *Tyminski v. United States,* 481 F. 2d 257 (3rd Cir. 1973); *Ciccarone v. United States,* 486 F. 2d 253 (3rd Cir. 1973); *Portis v. United States,* 483 F. 2d 670 (4th Cir. 1973); *Bridgford v. United States,* 550 F. 2d 978 (4th Cir. 1977); *Beech v. United States,* 345 F. 2d 872 (5th Cir. 1965); *Jordan v. United States,* 503 F. 2d 620 (6th Cir. 1974); *DeWitt v. United States,* 593 F. 2d 276 (7th Cir. 1979); *Hulver v. United States,* 562 F. 2d 1132 (5th Cir. 1977); *Brown v. United States,* 353 F. 2d 578 (9th Cir. 1965); *Exnicious v. United States,* 563 F. 2d 418 (10th Cir. 1977).

Only the First Circuit is unrepresented in this list of jurisdictions which follow *Quinton,* because the First Circuit applies state law in its determination of what constitutes "accrual" under the Federal Tort Claims Act. *Hau v. United States,* 575 F. 2d 1000 (1st Cir. 1978). Hau also uses the "discovery test" but determines its use under Puerto Rican law.

19. The *Quinton* decision was written by Chief Judge Tuttle, and Judge Wisdom of the Fifth Circuit Court of Appeals, with Judge Hutcheson concurring. Coincidentally, Judge Wisdom was

will be thwarted and too many cases of blameless ignorance will go without a remedy.[20] Similarly, the policy of granting relief to victims of governmental negligence will not be carried out. This is particularly true of medi-

19. (Cont'd.)
sitting by designation in the Seventh Circuit Court of Appeals and rendered the most recent appellate decision under the *Quinton* test in *DeWitt v. United States,* 593 F. 2d 276 (7th Cir. 1979). The *DeWitt* court held that all elements of a cause of action must be discovered before the statute of limitations accrues. Judge Wisdom in his opinion in *DeWitt* warned against a literal interpretation of *Quinton.* "A literal reading of the Quinton rule would have barred the approaches taken in *Kubrick, Portis* and *Jordan.* These decisions properly recognized that the *Quinton* rule must be flexibly construed to promote the sound policy that 'blameless ignorance' should not result in the loss of the right to assert a malpractice claim." *DeWitt v. United States, supra* at 279.

20. Among those cases where relief has been granted, but would have been denied because of a literal reading of the blameless ignorance rule is *Jordan v. United States,* 503 F. 2d 620 (6th Cir. 1974). There the plaintiff had nose surgery at a VA Hospital in hopes of correcting a sinus condition. Immediately after the operation, he had serious problems with his right eye. In response to his questions concerning his right eye he was told by VA doctors that his problems resulted from muscle damage caused by procedures to deal with the unanticipated severity of the sinus condition. In 1971, he was told "it was too bad they screwed up your eye when they operated on your nose." Jordan, even though he knew that the operation caused his injury, was blamelessly ignorant that the injury was related to malpractice. A case applying state law presents a glaring example of why elements other than causation and harm are necessary in a discovery rule to protect the blamelessly ignorant. The court in *Lopez v. Swyer,* 115 N. J. Super. 237 (1971), aff'd 62 N. J. 267 (1973) granted relief to a woman who knew both causation and harm; but did not know that the harm was related to malpractice. In *Lopez,* the plaintiff had a mastectomy in 1961. After the mastectomy she was given radiotherapy. As a result of the radiotherapy she developed burns and necrotic ulcers. At that point, she knew of her injuries and that radiotherapy had caused them. What she did not know was that there had been malpractice. Not until 1967 did she discover the malpractice. Fortuitously, she overheard doctors discussing her case and one said ". . . and there you see gentlemen what happens when a radiologist puts a patient on the table and goes out and has a cup of coffee." *Lopez v. Swyer,* 115 N. J. Super. 237 (1971). The *Lopez* court found that the cause of action accrued in 1967.

cally complex cases, as the case at bar; where despite his knowledge of his injury and its cause; his ignorance makes him unaware that malpractice has been involved. In many cases, a simplistic, narrow, or literal interpretation of *Quinton* will suffice because, as in *Quinton* itself, knowledge of harm and causation would alert a layman that there has been malpractice.[21]

In the *Quinton* case, the revelation of the cause of the injury and of the malpractice occurred simultaneously. Even in the cases where *Quinton* has been interpreted narrowly, the plaintiff knows all elements of his cause of action before suit.

If the claimant need not know all aspects of his claim on the date of accrual of the action, but only need know causation and injury, he would be forced to abandon all ideas of suing if his investigation does not reveal the relationship within two years. The claimant, who does not

21. In the cases under FTCA, where Federal law has been applied and where *Quinton* has been construed narrowly to define "accrual" as the time when both injury and causation are known; the knowledge of causation and injury automatically alert the plaintiff to the malpractice. *Ashley v. United States,* 413 F. 2d 490 (9th Cir. 1969) (where plaintiff was told before blood was taken that a nerve might be hit and was told after blood was taken that a nerve had been hit; soon after the blood was taken, plaintiff experienced injury); *Brown v. United States,* 353 F. 2d 578 (9th Cir. 1965) (where a baby's parents were told that her vision would be impaired because of the use of oxygen at her birth); *Hulver v. United States,* 562 F. 2d 1132 (8th Cir. 1977); cert. den. 435 U. S. 951 (where an operation resulted in the loss of sexual function and in Hulver's leg being disabled). All of the other federal jurisdictions which apply federal law to determine accrual of a cause of action under the FTCA have accepted the more enlightened and less literal interpretation of the Fifth Circuit's discovery test. *Toal v. United States,* 438 F. 2d 222 (2d Cir. 1971); *Kubrick v. United States,* 581 F. 2d 1092 (3rd Cir. 1978); *Bridgford v. United States,* 550 F. 2d 978 (4th Cir. 1977); *Jordan v. United States,* 503 F. 2d 620 (6th Cir. 1974); *DeWitt v. United States,* 593 F. 2d 276 (7th Cir. 1979); *Exnicious v. United States,* 563 F. 2d 418 (10th Cir. 1977); *Cook v. United States,* M. D. Ga., Civil Action No. 77-6-COL (opinion filed February 21, 1979).

know of the negligence, but who is under the pressure of the rule proposed by the Government, might be forced to bring suit without being aware of negligence and without being aware of who the defendant actually is, just to avoid being barred from suit by the statute of limitations.

To advocate accrual when only causation and injury are known is to leave to chance and the cunning of the plaintiff the discovery of malpractice within two years. Under this scheme, the "lucky plaintiffs" will be those who are aware of the injury and its cause and the apprehension of malpractice is simple and obvious to a layman; the "unlucky plaintiffs" will be those where the malpractice is difficult to ascertain. Where the wrong leg is amputated, the victim will obviously know of the malpractice and can begin suit immediately. In a technically complex drug reaction, as in the instant case, the plaintiff would be forced to investigate causation and injury until he could find malpractice, and hopefully, for the viability of his claim, he would develop a theory of malpractice within two years. Otherwise, his claim would be lost.[22] Congress meant no such inequitable result when it defined the statute of limitations under the FTCA. This is particularly true where the Congressional purpose in enacting the FTCA was to prevent inequitable results as had existed under the private bill system. See 56 Yale L. Rev. 534 (1947).

22. In its brief at pages 19 and 32, the Government discusses the use of discovery procedures in cases of technical complexity. By this statement, the Government seems to be advocating the starting of suit before all aspects of malpractice are known. Knowledge of causation and injury is not enough to sue in tort under the Federal Tort Claims Act. To file suit before a complete cause of action is known to exist would expose defendants to far greater abuses than to define the accrual of a cause of action to include knowledge of injury, causation, duty and breach of duty. To advocate such an approach would be to hold the Government strictly liable for the torts of its employees under the FTCA; that Congress never intended.

E. This Case Compels the Use of a Discovery Test Which Requires That a Plaintiff Know All Aspects of His Cause of Action—Injury, Causation, Duty, and Breach of Duty Before His Claim Accrues.

This case presents a situation where the cause of action is medically complex, and where the plaintiff was hindered in discovering all aspects of his claim by the Veterans Administration and its physicians, and by physicians in the private sector.[23]

23. Several federal medical malpractice cases decided under the FTCA employ a discovery test requiring knowledge of injury, causation, duty, and breach of duty; so as not to deny relief where physicians have deterred claimants from discovery of all aspects of malpractice. In *DeWitt v. United States*, 593 F. 2d 276 (7th Cir. 1979), the plaintiff suffered severe pain after operations on her hand in 1971 and 1972. Physicians assured her that if she followed a regimen of therapy, her hand would improve. She followed a regimen until 1973. The Court held that the District Court's summary judgment based on the statute of limitations was erroneous and remanded the case for a determination of the facts. The standard, the Court said, was whether the plaintiff knew of all aspects of her cause of action—injury, causation, duty and breach of duty, within two years of instituting suit. *Jordan v. United States*, 503 F. 2d 620 (6th Cir. 1974) also employed the four pronged test of injury, causation, duty and breach of duty in declaring that Jordan's cause of action accrued, only when he knew that his eye injury was caused by malpractice. Physicians had led him to believe that his eye injury occurred because extreme measures were necessary during his nose operation to correct his sinus condition. In *Bridgford v. United States*, 550 F. 2d 978 (4th Cir. 1977), the claim did not accrue until the plaintiff discovered malpractice. There, Bridgford complained of pain after a vein stripping operation. Physicians told him there had been an error, but that the error had been corrected. They laid Bridgford's later complaints of pain to emotional problems. In fact, Bridgford's problem resulted from malpractice during his earlier operation; said malpractice was not discovered until years later. In *Tyminski v. United States*, 481 F. 2d 1257 (3rd Cir. 1973), the case most analogous to the case at bar, the veteran there underwent an exploratory operation to determine if he had AVA (Arteriovenus angioma). After the operation, the plaintiff continued to lose control of bodily functions in his lower extremities until he became paraplegic. Physicians at the Veterans Administration and the rating decisions by the VA informed Tyminski that his condition was caused, not by negligence, but by the progression of the AVA.

His failure to discover the fact that malpractice was perpetrated upon him was solely because of blameless ignorance; Kubrick never stopped diligently pursuing his claim (Pet. App. 23a-29a). He did not discover malpractice because his education and employment background did not provide him with the intellectual tools necessary. Even if he had gotten on the right track as to negligence, he was constantly derailed by the representations of the VA and its physicians (Pet. App. 24a-29a).

The questions of causation were so complex that Kubrick had to go to several physicians before Dr. Sataloff revealed that it was "highly possible" that the eighth cranial nerve deafness from which he suffered was as a result of the use of neomycin (Pet. App. 24a). Kubrick was told again and again by the Veterans Administration that only systemic use of neomycin could have caused his deafness; topical use could not have caused it (A. 13-14, 21-22). Then, the VA said that Kubrick's deafness was caused by his work in the machine shop (Pet. App. 26a-27a), and finally said the deafness "may" have been caused by neomycin administration (Pet. App. 25a-26a). Apparently the problem of causation was so complex that many physicians, including those at the VA, could not comprehend it.

The causation problem was apparently not as difficult for the physicians at the Veterans Administration as was their determination of whether the administration of neomycin had been negligent. From 1969 until 1973, the VA told Kubrick that the neomycin administration had not been negligent (Pet. App. 25a-29a). In 1975, the VA reversed its earlier decisions and said neomycin had been negligently administered and that the prior decisions had been clearly erroneous (Pet. App. 30a-31a).

23. (Cont'd.)
The Court held that Tyminski's claim was not barred by the statute of limitations—he had used reasonable diligence to discover the acts constituting malpractice.

It would be patently absurd to require a layman to discover that his treatment had been negligent when the VA physicians believed that the administration of neomycin at the VA had been proper. The VA apparently held to this belief even after they thought that neomycin may have caused Kubrick's deafness. Can a layman be held to a higher standard of knowledge than the reviewing physicians at the Veterans Administration? To determine accrual by the discovery of only injury and causation would require that the layman understand that the method of the application of neomycin was negligent. In reality, Kubrick could not possibly know that unless a physician told him. The physicians he confronted at the VA, did not even agree among themselves as to whether or not there had been malpractice (Pet. App. 25a-29a).

Kubrick was a victim of a "conspiracy of silence" as to causation and negligence perpetrated by the Veterans Administration. The Veterans Administration and their physicians did not reveal malpractice to the plaintiff. In fact, they vehemently denied such malpractice. Although the plaintiff never contended that he was treated negligently in his application to the Veterans Administration for increased benefits under 38 U. S. C. 351, he was gratuitously told on numerous occasions by the Veterans Administration and their physicians that he had no cause of action for medical malpractice (Pet. App. 25a-29a).

The Veterans Administration, including their physicians, continuously denied that Kubrick's hearing loss was caused by the administration of neomycin (Pet. App. 25a-29a). At one point, the VA attributed the hearing loss to Kubrick's work in a machine shop (Pet. App. 26a-27a). On August 9, 1972, the Veterans Administration stated that there "may" have been a connection between neomycin and deafness. Only in 1975, three years after this claim was filed, did the Veterans Administration and its physicians conclude that the respondent's deafness resulted from both the neomycin administration and negligence in that administration and that their earlier decisions had been "clearly and unmistakably erroneous" (Pet. App. 30a-31a; A. 51-55).

Prior to the 1975 revelation, Kubrick was confronted again and again with reports by the Veterans Administration physicians which denied negligence and causation (Pet. App. 25a-29a). As a layman, what was Kubrick to believe, when many physicians and VA officials told him he was not the victim of negligent neomycin administration?

The physicians in the private sector were not of much help to Kubrick in his recognition that he had a malpractice claim. He went to several physicians when he first noticed a hearing problem in 1968; they were unable to diagnose the problem (Pet. App. 23a). Dr. J. J. Soma, whom the plaintiff consulted in 1968, did not tell Kubrick at that time either the causation of his problem or that medical malpractice had been involved (Pet. App. 23a). Only in 1971 did Dr. Soma reveal that not only had neomycin caused the hearing loss, but that it should never have been given (Pet. App. 27a-28a). Dr. Sataloff, who Kubrick saw in 1968, revealed the possible causation of his hearing loss (Pet. App. 23a), but not malpractice in the administration of neomycin (A. 136).

To deny relief to the plaintiff here would be to perpetrate an injustice by punishing a machinist for blameless ignorance, because he failed to understand the technical complexity of the negligence that was perpetrated on him. Such a result would be in derogation of the purposes of the Federal Tort Claims Act; that Act provides for uniform relief to victims of the negligence of government employees.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed; since the respondent's action was commenced within two years of the time he discovered all necessary elements of his claim for medical malpractice.

Respectfully submitted,

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